IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

STEVEN WAYNE MITZNER,
JAMES B. MITZNER,
LUCIEN B. BURNHAM AND
CHARLES EDWARD MITZNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT
OF CERTIORARI

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TOPICAL INDEX

		Page
Table of Authorities		iv
A.	OPINION BELOW	2
B.	JURISDICTION	2
C.	QUESTIONS PRESENTED FOR REVIEW	4
D.	CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.	7
E.	STATEMENT OF THE CASE	11
	1. Proceedings and Jurisdiction:	11
	2. Material Facts	13
F.	CONCISE ARGUMENT - REASONS FOR ALLOWANCE OF WRIT	20
	1. Introductory Matter	20

2. In Light of Recent Decisions of This Court, Section 6331 of Title 26 U.S.C. Is and Ought to Be Declared Unconstitutional as Denying Due Process of Law in Violation of the Fifth Amendment as Applied to the Facts in This Case. 21

3. The Act of the Internal Revenue Agents Violated The First Amendment Rights of These Petitioners of Freedom of Speech and Movement. 29

4. The Prosecution-Controlled Secret, Unrecorded Grand Jury Proceedings in This Case Denied Due Process of Law Guaranteed Under the Fifth Amendment of the United States Constitution. 32

5. The Excessive Security Measures Employed Influenced the Jury and Effectively Denied to Petitioners Due Process of Law Guaranteed Under the Fifth Amendment. 35

6. The Actual Seizure in This Case, Not Having Been in Compliance With Applicable Law, Was in Violation of the Fourth Amendment of the United States Constitution. 37

7. There Is a Conflict Between the Decision and Rule of the Court of Appeals in the Ninth Circuit and Decisions in Other Circuits. 40

CONCLUSION 43

TABLE OF AUTHORITIES

Cases	Page
Aptheker v. Secretary of State, 378 U.S. 500, 84 Sup.Ct. 1659	32
Bell v. Burson, 405 U.S. 538, 92 Sup.Ct. 1113	22
Board of Regents v. Roth, 408 U.S. 564	26, 28
Boddie v. Connecticut, 401 U.S. 371, 91 Sup.Ct. 780, 28 L.Ed.2d 113	22, 26, 27
Cafeteria and Restaurant Worker's Union v. McElroy, 367 U.S. 86, 82 Sup.Ct. 1713	27, 28
California Department of Human Resources Development v. Java, 402 U.S. 121, 91 Sup.Ct. 1347, 28 L.Ed.2d 666	22
Early v. Shafesbury, 8 How.St.Tr. 759	32
Ernest v. Willingham, 406 F.2d 681 (C.A. Kan. 1969)	23
Fuentes v. Shevian, 407 U.S. 67, 92 Sup.Ct. 1983	23, 26

Goldberg v. Kelly,
397 U.S. 254, 90 Sup.Ct. 1011,
25 L. Ed. 2d 287 22

Hale v. Henkel,
201 U.S. 43, 26 Sup.Ct. 370 39

Loux v. United States,
389 F.2d 911 (9th Cir. 1968) 37

Lynch v. Household Finance Corporation,
405 U.S. 538, 92 Sup.Ct. 1113 22

McEwen v. United States,
390 F.2d 47 (9th Cir. 1968) 41

Mitchell v. W. T. Grant Company,
94 Sup.Ct. 1895,
42 U.S.L.W. 4671 26, 27

Morisette v. United States,
342 U.S. 246, 72 Sup.Ct. 240 42

Pettibone v. United States,
148 U.S. 197, 13 Sup.Ct. 1541 41, 42

Phillips v. Commissioner,
283 U.S. 589, 51 Sup.Ct. 608 21, 22
26, 27

Pizzarello v. U.S.,
408 F.2d 579 (2nd Cir. N.Y.
1969) 40

Randone v. Appellate Department of Superior Court of Sacramento County, 5 Cal. 3d 536, 96 Cal. Rptr. 709 — 24

Sandnes Sons, Inc. v. United States, 462 F. 2d 1388 — 26, 28

Sheppard v. Maxwell, 384 U. S. 33, 86 Sup. Ct. 1507 — 36

Sniadach v. Family Finance Corp. of Bayview, 395 U. S. 337, 89 Sup. Ct. 20, 23 L. Ed. 2d 349 — 22

United States of America v. Alsondo, et al., 486 F. 2d 13? (2nd Cir. Nov. 1973) — 43

U. S. v. Calabro, 276 F. Supp. 284 (S. D. N. Y. 1967) — 40

U. S. v. Dentice, 289 F. Supp. 799 (E. D. Wisc. 1968) — 40, 41

United States v. Giordano, 94 S. Ct. 1820 (decided May 13, 1974) — 40

U. S. v. Greenwell, 418 F. 2d 847 (4th Cir. 1969) — 37

United States v. Kartman,
417 F.2d 893
(9th Cir. 1969) 41

United States v. Rybicki,
403 F.2d 599
(6th Cir. 1968) 40, 41, 42

U. S. v. Samuels,
431 F.2d 610
(4th Cir. 1970) 37

United States v. Tarlowski,
305 F. Supp. 112
(N.Y. 1969) 32

United States v. Ulnan,
421 F.2d 787 40

United States v. Young,
464 F.2d 160
(5th Cir. 1972) 40

Yokahama, etc. v. Wong,
113 F.2d 329 (C.C.A. Cal.) 39

Constitutions

United States Constitution:

First Amendment 3, 5, 7
29, 33

Fourth Amendment 3, 5, 7
37, 39

United States Constitution:

Fifth Amendment 3, 4, 5, 7, 21, 29, 32, 35

Sixth Amendment 3, 5, 8

Fourteenth Amendment 23

Statutes

California Penal Code Section 938 34

Title 18 U.S.C.:

Section 111 6, 8, 12, 41, 42, 43

Section 371 8, 12

Section 1114 8

Section 3231 13

Title 26 U.S.C.:

Section 6202(b) 11

Section 6331 4, 9, 21, 25, 26, 37, 38

Section 6334 10, 14, 38, 39

Section 6335 10, 38

Section 6502(b) 38

Title 26 U.S.C.:

Section 7212(b) 12

Title 28, U.S.C.:

Section 1254(1) 4

England - Criminal Justice Act of 1967 34

England - Indictable Offenses Act 1848-17, Administration of Justice Act 1933 34

Textbooks

Calkins "Grand Jury Secrecy" 63 Mich. L. Rev. 455 (1965) at p. 457 32

Graham & Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations," 18 U.C.L.A. L. Rev. 638 and 678 32

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Steven Wayne Mitzner, James B. Mitzner, Lucien B. Burnham and Charles Edward Mitzner (four of the seven appellants, affected by the judgment and decision of the United States Court of Appeals for the Ninth Circuit set out in the Appendix "A" and "B" -- the other named appellants to file separate petitions for Writs of Certiorari),

respectfully pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, dated January 30, 1974, and the opinion on petition for rehearing and to modify judgment dated June 5, 1974.

A. OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is set out in Appendix "A."

The opinion of the Court of Appeals on Petition for Rehearing and to Modify Judgment, not yet reported, is set out in Appendix "B."

There was no opinion rendered by the United States District for the Southern District of California, but copies of the judgments as to each of the petitioners are set out in Appendix "C."

B. JURISDICTION

Grounds on which the jurisdiction of this court is invoked are to resolve conflicts between the decision of the Court of Appeals in this matter and decisions of other Courts of Appeals on the same questions of law, and that the Court of Appeals has decided important

questions of federal law which have not been but should be settled by this court, involving constitutional rights of these petitioners under the First, Fourth, Fifth and Sixth Amendments of the United States Constitution.

(i) The judgment of the United States Court of Appeals for the Ninth Circuit in this matter was dated January 30, 1974 and was entered on January 30, 1974.

(ii) The Opinion on Petition for Rehearing and to Modify Judgment of the United States Court of Appeals for the Ninth Circuit in this matter was dated June 5, 1974. No notice of entry has been received.

(iii) A joint application for extension of time to file a petition for Writ of Certiorari was filed on behalf of petitioners by counsel representing other appellants in the case (who will also file petitions for a Writ of Certiorari in this matter) but no notice of action on such application has been received as of the time of preparation of this petition.

(iv) The statutory provision believed to confer on this court

jurisdiction to review the judgment of the Court of Appeals in this matter is Title 28, U.S.C., Sect. 1254(1).

C. QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 6331 of Title 26 of U.S.C., authorizing unilateral ex parte seizure of a taxpayers property by Internal Revenue Officers without a hearing violates the due process provisions of the Fifth Amendment of the United States Constitution when applied to the facts in this case.

2. Whether the acts of Internal Revenue Agents in this case in disrupting and interfering with peaceful picketing by petitioners on the streets of San Diego, protesting the taking possession of a taxpayers going business and building -- which the Internal Revenue later admitted in open court had not been lawfully seized; by deliberately rushing and shoving the crowd including one of petitioners into the building, and by grabbing, seizing and striking citizens and petitioners on the streets of San Diego and then arresting them for resisting and charging them with interference with and assaulting federal officers in the performance of their duties was violative of their right of freedom of

speech and movement guaranteed under the First Amendment of the United States Constitution.

3. Did the secret, unrecorded grand jury proceedings in this case which received apparent untrue testimony by IRS agents -- (it being the contention of petitioners that the jury was simply an arm of the prosecution and not a protection against the crown) -- a denial of due process as guaranteed under the Fifth Amendment of the United States Constitution?

4. Were the petitioners in this case denied due process of law as guaranteed them under the Fifth Amendment on trial by an impartial jury as guaranteed by Sixth Amendment by the placing many armed, badge-wearing United States Marshals and sophisticated electronic surveillance devices at the entrance of the courtroom where both the defendants and the jury had to enter?

5. Was there an unlawful seizure in violation of the Fourth Amendment of the United States Constitution by the Internal Revenue Agents in the taking possession by force and threats of the going business and buildings in this case?

6. Were petitioners denied due process of law in violation of the Fifth Amendment by the suppression, concealment

and withholding by the government of photographs showing the persons who actually struck the Internal Revenue Agents that petitioners Mitzner were charged with assaulting?

7. In order to sustain a count of violation of Section 111 of Title 18 U.S.C. -- interfering with or assaulting an internal revenue agents in the performance of their duty -- are not essential elements "knowledge" onthe part of the defendants that they were in fact internal revenue agents and that they were in the performance of their duties so that refusal to so instruct jury amounted to prejudicial error.

8. In order to convict for violation of Section 111 of Title 18 U.S.C. -- interfering with or assault on a federal officer in the performance of his duties -- is it not essential that the officer in fact must be in the performance of his duties in order to sustain the charge.

9. On a charge of conspiracy to assault a federal officer in violation of Section 111 of Title 18 U.S.C. is not specific knowledge of the official federal capacity of the officer an essential element which must be proved and regarding which the court must instruct the jury?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

First Amendment United States Constitution:

"Congress shall make no law respecting . . . or abridging the freedom of speech . . . or the right of the people peaceably to assemble and to petition the government for redess of grievances."

Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported on oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution:

"No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury and to have the assistance of counsel for his defense."

Section 111 of Title 18, U.S.C.:

> "Whoever forceably assaults, resisting, opposes, impedes, intimidates or interferes with any person designed in Section 1114 of this title, while engaged or on account of the performance of his official duties, shall be fined not more than $5,000.00, or imprisoned not more than three years, or both. * * *"

Section 1114 of Title 18, U.S.C. refers to and includes:

> ". . . any officer, employee or agent of . . . the Internal Revenue. . . ."

Section 371 of Title 18, U.S.C. provides in part:

> "If two or more persons conspire either to commit any offense

against the United States Government or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. * * * "

Section 6331 of Title 26 U.S.C.:

"(a) Authority of Secretary or Delegate. If any person liable to pay any tax neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the secretary of his delegate to collect such tax (and such further sums as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under Section 6334) belonging to such person or on which there is a lien provided in this Chapter for payment of such tax * * * "

"(b) Seizure and Sale of Property. The term 'levy' as used in this Title includes the power of

distraint and seizure by any means. * * * "

6334 of Title 26, U.S.C.:

"(a) Enumeration. There shall be exempt from levy --
* * *

"(3) books and tools of a trade, business or profession -- so many of the books and tools necessary for the trade, business or profession of the taxpayer as do not exceed in the aggregate $250.00 in value.

"(b) Appraisal. The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the secretary or his delegates shall summon three disinterested individuals who shall make the valuation."

Section 6335 of Title 26 U.S.C.:

"Notice of Seizure. As soon as practicable after seizure of

property, notice in writing shall be given by the secretary or his delegate to the owner of the property * * * such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in case of real property, a description with reasonable certainty of the property seized. . . . * * * * "

Section 6202(b), Title 26 U.S.C.:

"(b) Date When Levy is Considered Made. The date on which a levy on property, or rights to property is made shall be the date on which the notice of seizure provided in Section 6335(a) is given."

E. STATEMENT OF THE CASE

1. Proceedings and Jurisdiction:

Petitioners were indicted by a Federal Grand Jury in San Diego, California for:

(a) Conspiracy to forcibly rescue property seized by officers of the Internal Revenue Service, in violation of Title 18 U.S.C. Sec. 371 and Title 26 U.S.C. Sec. 7212(b);

(b) Forcible attempt to rescue property seized by officers of the Internal Revenue Service, in violation of Title 26, U.S.C. Sec. 7212(b);

(c) Conspiracy to forcibly assault, resist and interfere with Internal Revenue Agents responsible for protection of seized property, in violation of Title 18, U.S.C. Sec. 371 and Title 18 U.S.C. Sec. 111; and,

(d) Forcible assault, resistance and interference with Internal Revenue Agents while engaged in the performance of their official duties, in violation of Title 18 U.S.C. Sec. 111. (Cl. Tr. 1-7, 10, 11.)

The jury returned verdicts of "guilty" as to petitioner Burnham as to all counts and "not guilty" as to petitioners Mitzners as to attempt to rescue seized property but "guilty" as to the other counts (Cl. Tr. 368-370).

The Court of Appeals for the Ninth Circuit ruled that there was no conspiracy to rescue seized property and no attempt to rescue seized property (as to all defendants),

reversed as to these counts (I and II) but affirmed as to the two counts of conpsiracy to asault and assault of Federal officers. (Opinion Appendix A.)

An opinion was rendered on the Petitions for Rehearing modifying the judgment but denying the petitions. (Appendix B.)

The basis for Federal jurisdiction in the District Court in the first instance is Title 18 U.S.C. Sec. 3231.

2. Material Facts

On May 4, 1972, two officers from the Internal Revenue Service in San Diego, California came to business premises of Heck's Transfer and Storage Company in that city, demanded of Mr. Heck that he pay an amount of a levy forthwith or they would take over his property and padlock his business (Rep. Tr. p. 260, line 4 to line 5 of p. 261, p. 111, lines 7-22).

Heck could not pay the levy, protested that to summarily close down his business would be depriving him of livelihood and property without due process of law, after which two armed Internal Revenue agents from the Intelligence Division, appeared on the scene advised Heck that they had a legal right to seize and padlock his property

and that if he resisted he would be placed in jail (Rep. Tr. p. 261, line 16 through line 19 of p. 262, p. 900, line 13 to line 8 of p. 901, p. 1112, line 12 through line 20 of p. 1115, p. 1116, line 13 through line 18, p. 1118).

Under this pressure Heck left his premises and the Internal Revenue agents locked up the building, posted a notice on it and thereafter listed the office equipment and items used by Heck to do business on a form "Notice of Seizure" which they later sent to him. The value of which personal property in the building amounted to approximately $156.00. (Government's Exhs. 13, 14 and 15, Rep. Tr. p. 1118 line 19 through line 7 of p. 1120.)

No "Notice of Seizure" was ever given as to the business and the "Notice of Seizure" as to the real property occurred after the event out of which the indictments in this case arose (Rep. Tr. p. 259, lines 12-17, p. 308, lines 6-11). The IRS changed the locks on the doors (Rep. Tr. p. 289, lines 18-22).

No enumeration of the books and tools of the business exempt under Section 6334 of Title 26 U.S.C. was made, and no appraisal in accordance with that section was made by the seizing officers (Rep. Tr. p. 276, line 15 to line 13, p. 277, p. 281, line 20 to line 9, p. 283).

About noon on May 9, 1972, petitioners and other persons from the various places in Southern California assembled on the public street in San Diego in front of the seized transfer company building of Mr. Heck to peacefully picket and demonstrate in order to attract public attention to the tactics of the IRS in this matter. Some of the group prior to assembling there contacted the news media, radio and television to get publicity, and telephoned the San Diego police asking them to be on hand to maintain order (Rep. Tr. p. 1129, line 25 through line 18, p. 1131, p. 1324, line 1 through line 25, p. 1326, p. 1364, line 4 through line 9, p. 1366, p. 1419, line 11 through line 8, p. 1421, p. 1327, line 3 through line 14, pp. 1329, 1366, line 11 thorugh line 15, p. 1369, p. 1421, line 9 through line 9, p. 1422).

In the meantime the Internal Revenue Service had dispatched 2 revenue officers, 4 intelligence agents and one undercover agent to the scene, and had alerted the FBI, which had received instructions from the U. S. Attorney to stand by until an assault was made on federal officers and then to arrest for assaulting federal officers (there being on the scene a total of perhaps nine FBI officers, including the supervisor). These officers were sent to protect the property, but did not stand at the door, which was the only entrance to the property (Rep. Tr. p. 602, line 19 through line 4, p. 603, p. 1007, lines

13-16, p. 1035, line 23 through line 19, p. 1036, p. 816, lines 5-18, p. 817, lines 15-21, p. 824, lines 12-17, p. 1008, lines 13-20).

The crowd was in a light mood, laughing and joking and finally after a time someone said "disperse" (Rep. Tr. p. 1370, line 21 to line 1, p. 1371, p. 1423, lines 8-24). After this, Mr. Heck picked up a rock or hard object, walked to the front door of his building, broke the glass, reached inside, opened the night latch, went in and sat down at this desk and answered the telephone, which he did to get publicity (Rep. Tr. p. 1140, line 7 through line 18, p. 1144).

When this occurred IRS Agent Clovis signalled the FBI down the street (Rep. Tr. p. 940, line 24, p. 941, line 6) and then rushed into the crowd and started grabbing and pulling persons (Rep. Tr. p. 927, line 20, p. 928, line 9). Another agent hit and shoved one of the petitioners aside, pushing his way through the crowd.

Another agent grabbed one of petitioners on the neck, pulled him back, and then the FBI agents rushed into the building and shoved through the crowd, pushing many of the persons into the building, including petitioner Burnham, who was shoved off balance and went reeling forward with his hands out to protect his face. He was

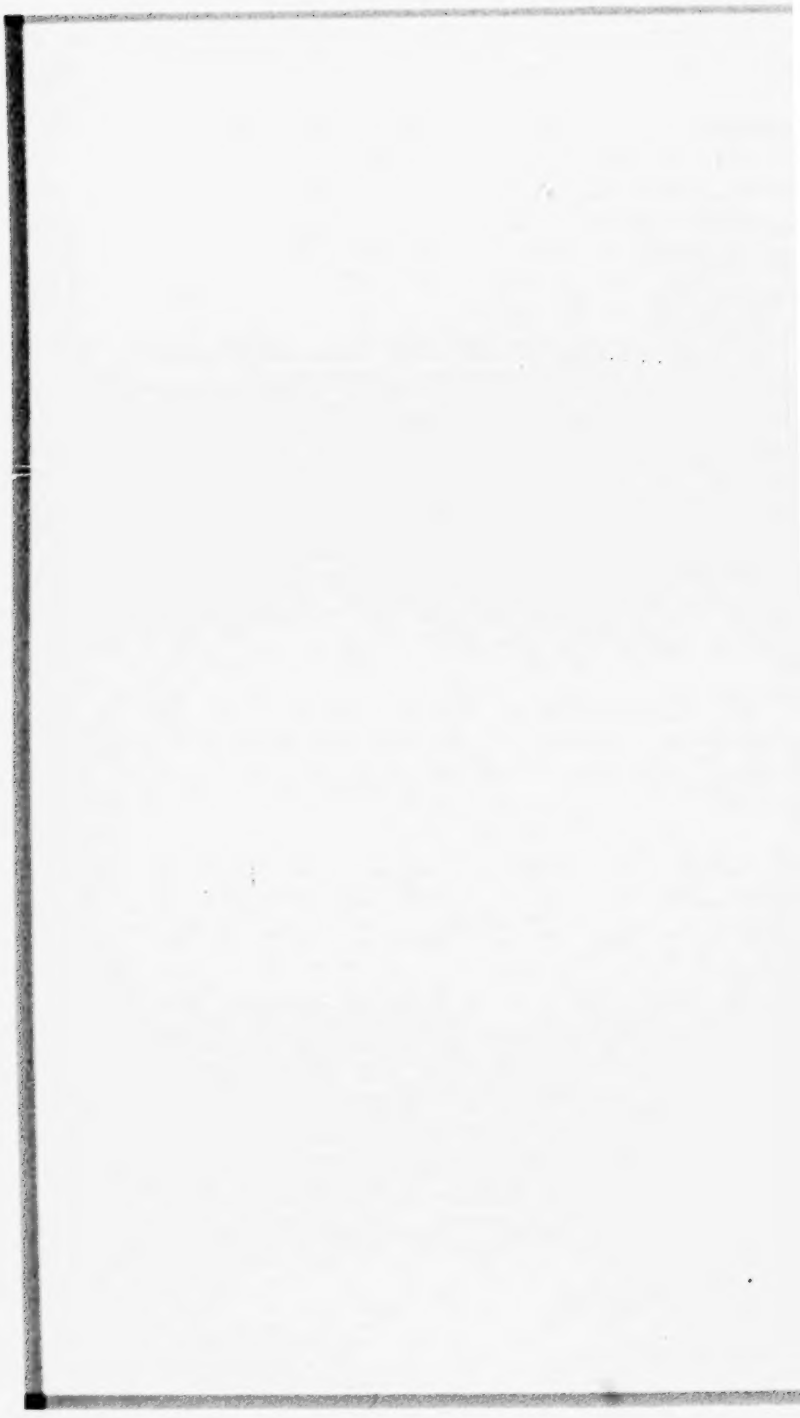
arrested for assaulting an IRS agent (and attempt to rescue seized property (Rep. Tr. p. 1293, lines 1-8, p. 1299 to p. 1301, lines 11, 12, p. 1302, line 2 through line 14, p. 1308, p. 1305, lines 5, 6, p. 1306, lines 1-6).

At the same time IRS Agent Rodriguez, who was carrying a loaded gun without a safety on in a shoulder holster after first grabbing petitioner Charles Mitzner by the back of his shirt and pulling in him back (Rep. Tr. p. 661, line 23 to line 4, p. 662) turned from the front of the building, ran out into the street, grabbed a Dr. Dingwall and held him against an automobile (Rep. Tr. p. 663, line 13 to line 22, p. 664).

None of the petitioners were at the immediate scene involving this transaction (Rep. Tr. p. 1337, line 21 through line 22, p. 1379, p. 1432, lines 4-6).

In the interim, the premises had been secured by the FBI and the IRS. The police were there also (Rep. Tr. p. 133, lines 3-16, p. 1380, lines 6-14).

Petitioners Mitzner then walked on the sidewalk area near the front door of the building where an FBI agent was standing and with police at the door to observe the activities, at which time IRS Agent Rodriguez, dressed in a sport coat, came up on the sidewalk and lunged at Steven Mitzner, striking

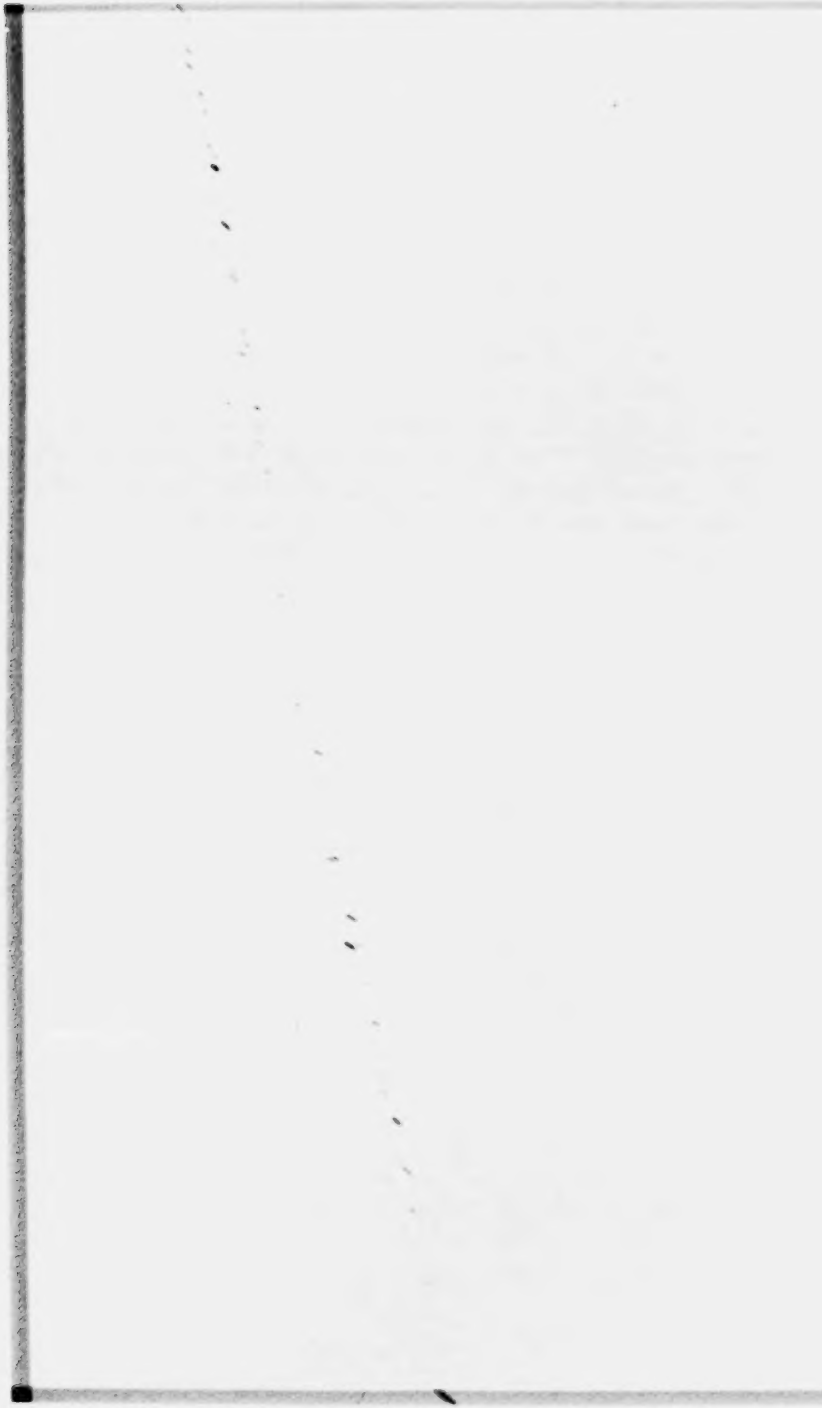


him on the cheek (Rep. Tr. p. 1380, line 18 through line 15, p. 1382, p. 1337, line 17 through line 8, p. 1338).

Agent Rodriguez then lunged at James Mitzner and without saying a word grabbed him around the waist in a bear hug. When Charles and Steven turned they saw their brother being grappled by a man in a light jacket. They reached over and pulled the man off of the younger brother (18 years) James and turned and let him go (Rep. Tr. p. 1433, line 12 through line 7, p. 1434, Gov't. Ex. 7).

Following this, Agent Rodriguez dropped his gun on the sidewalk, picked it up (Rep. Tr. p. 1386, line 21 through line 17, p. 1387), then walked down the block and arrested petitioner Steven Mitzner allegedly for assaulting and interfering with him as an IRS agent. Later, he grabbed young James Mitzner and tried to drag him into the building at which time a member of the crowd tried to get the San Diego police to place Agent Rodriguez under arrest for striking several citizens. Finally, FBI Supervisor Maloney, walked up showed his credentials to James and placed him under arrest.

Petitioner Charles Mitzner left the scene and telephoned the San Diego District Attorney to ask for help, explaining what had happened, but was unable to get any help (Rep. Tr. p. 1443, lines 1-10).



Special Agent Clovis appeared before the grand jury and testified, there being no reporter while he was testifying and no transcript (Rep. Tr. p. 923, line 19 through line 5, p. 924). In court he testified that nobody ever said they were going to forceably take back any property (Rep. Tr. p. 920, line 13 through line 21)/ he saw no effort on the part of petitioner Burham to reach toward any property (Rep. Tr. p. 921, lines 9-11) but then admitted that he told the grand jury that he arrested these people for attempting to forceably rescue property and may have told the grand jury that individuals had said that they were going to forceably rescue property (Rep. Tr. p. 925, lines 1-12).

Throughout the trial there was a vast number of armed, badge-wearing United States Marshals guarding the entrance to the courtroom and attending the door. However, on the last day at the time that the case was submitted to the jury there was placed at the entrance to the courtroom 13 or 14 armed, badge-wearing United States Marshals and sophisticated electronic posts thorough which each juror, each defendant and each attorney had to pass in order to enter the courtroom. Motions for mistrial on this ground were denied (Cl. Tr. p. 1778, line 5 through line 16, p. 1780).

After motions for judgment of acquittal and for a new trial were denied by the court, the court pronounced sentence,

following which an appeal was taken to the Court of Appeal (Cl. Tr. p. 371, 372, 376 to 386, 409 and 419).

F. CONCISE ARGUMENT - REASONS FOR ALLOWANCE OF WRIT

1. Introductory Matter

Petitions for Writ of Certiorari are also to be filed on behalf of Armin R. Moths, John Robert Heck, Jr. and Edward F. Ross, co-defendants in this case. Because of the shortness of time, pressures of litigation and the fact that the other petitioners are in San Diego, and Anaheim, California, while counsel for these petitioners is in Los Angeles, California, it has not been possible to coordinate the material and points for one unified presentation.

Petitioners, therefore, respectfully incorporate by reference the points and material to be presented in the petitions of Armin P. Moths, John Robert Heck, Jr. and Edward F. Ross for a Writ of Certiorari in this case, and respectfully ask that the court consider this petition jointly and in conjunction with the petitions for Writ of Certiorari to be filed by such other parties.

2. In Light of Recent Decisions of This Court, Section 6331 of Title 26 U.S.C. Is and Ought to Be Declared Unconstitutional as Denying Due Process of Law in Violation of the Fifth Amendment as Applied to the Facts in This Case.

This section authorizes unilateral ex parte seizure by Internal Revenue Officers of a taxpayer's property "by any means" and without a hearing.

The unilateral seizure by the Internal Revenue Service (made without complying with the statutory mode) in this case, and from which all of the indictments stem, was under the claimed authority of Sec. 6331 of Title 26 U.S.C. (Rep. Tr. p. 289, line 18 to line 4, p. 290).

Historically, this section has been sustained by the alleged need of the government to collect its revenues and predicated upon the 1930 case of Phillips v. Commissioner, 283 U.S. 589, 51 Sup. Ct. 608, which sets forth the classic and oft repeated comment:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process. . . ."

283 U.S. 589, p. 595.

As this court recently said in the case of Lynch v. Household Finance Corp., 405 U.S. 538, p. 552, 92 Sup.Ct. 1113, p. 1122:

> "Property does not have rights. People have rights."

This court, in the cases of:

Sniadach v. Family Finance Corp. of Bayview,
395 U.S. 337, 89 Sup.Ct. 20, 23 L.Ed.2d 349;

Goldberg v. Kelly,
397 U.S. 254, 90 Sup.Ct. 1011, 25 L.Ed.2d 287;

Boddie v. Connecticut,
401 U.S. 371, 91 Sup.Ct. 780, 28 L.Ed.2d 113;

California Department of Human Resources Development v. Java,
402 U.S. 121, 91 Sup.Ct. 1347, 28 L.Ed.2d 666;

Bell v. Burson,
402 U.S. 535, 91 Sup.Ct. 1586, 29 L.Ed.2d 90;

Lynch v. Household Finance Corporation,
405 U.S. 538, 92 Sup.Ct. 1113;

Fuentes v. Shevian,
407 U.S. 67, 92 Sup.Ct. 1983;

has ruled that due process of law under the Fourteenth Amendment is denied where there is a prejudgment garnishment without a hearing, where there is a cutting off of public assistance without a hearing, where there is denial of divorce because of inability to pay fees to get into court, where there is an automatic suspension of benefits without a hearing, where there is a suspension of drivers license without a hearing, and where there is a prejudgment replevin without a hearing.

A federal agency may not, consistent with due process under the Fifth Amendment, do that which state is forbidden to do by due process under the Fourteenth Amendment.

Ernest v. Willingham,
406 F.2d 681 (C.A. Kan. 1969).

The argument of necessity of the government to collect its revenues being a justification for denial of a hearing before seizure in this case, has no merit as is pointed out below.

Perhaps the best perspective and analysis of the trend of this court's views of situations where summary procedures are to be permitted is the California Supreme

Court case of:

Randone v. Appellate Department of Superior Court of Sacramento County,
5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971).

There, the court in analyzing the decisions of this court on such matter, on page 554 of 5 California 3d and on pages 720 and 721 of 96 Cal. Rptr., points out that the decisions of this court reflect that five conditions must appear to justify summary procedure:

(1) The seizure is undertaken for the benefit of the general public;

(2) The procedure could only be initiated by an authorized government official who might reasonably be expected to proceed only to save the general welfare;

(3) The nature of the case, the risks involved requires immediate action and any delay occasioned by a prior hearing could potentially cause serious harm to the public;

(4) Property seized did not vitally touch an individual's life or livelihood;

(5) The takings are conducted under narrowly drawn statutes that sanction the summary procedure only when great necessity actually arose.

Here, the item seized was a going business which had been established and in operation since 1910. The real property was intact and being utilized for the storage of goods of the business' customers.

Thus, from the nature of case, there was no risk involved which required immediate action, and any delay occasioned by a prior hearing could not potentially cause any serious harm to the public, or at all.

The property seized did vitally touch an individual's life and livelihood in that Mr. Heck was summarily put out of business and denied a livelihood.

Section 6331 is not a narrowly drawn statute which sanctions summary procedure only when great necessity actually arises. Rather, it is a broad statute which permits indiscriminate and arbitrary seizure without limitation or showing of any actual need or necessity.

It therefore denies due process and is inconsistent with any fair or reasonable treatment which a citizen has right to expect from his government without denying to the

government any right or protection it needs.

In its opinion on the petition for rehearing, the Court of Appeals in this case ruled directly that 26 U.S.C. Sec. 6331 was constitutional.

In so doing it relied in part upon the footnote reference of this court to the case of Phillips v. Commissioner, supra, in the decision of Fuentes v. Shevin, 407 U.S. 67, 90 and 92 (1972) and to the case of Mitchell v. W. T. Grant Company, decided May 13, 1974, 94 Sup. Ct. 1895, 42 U.S.L.W. 4671. It also referred to the decision of this court in Boddie v. Connecticut, 401 U.S. 371, 379 (1971) and Board of Regents v. Roth, 408 U.S. 564, 570, note 7 (1972) and mentioned the case of Sandnes Sons, Inc. v. United States, 462 F.2d 1388, 1391 (Court of Claims 1922).

It is respectfully submitted that none of these cases are factually relevant and therefore afford no support to the Court of Appeal's conclusion.

In the Fuentes v. Shevian case, supra, Phillips v. Commissioner, 283 U.S. 589, 51 Sup. Ct. 608 mentioned in the footnote, appears to be collateral to the issue there decided. There were no factual similarities to the present case.

In the Mitchell v. W. T. Grant Company case, supra, decided by this court on May 13, 1974, while there was reference to the Phillips case, it also appeared not to be relevant to the ultimate decision of the court for there the matter involved was a writ of sequestration to protect a vendor's lien on sale of personal property after default by the buyer on installment payments where the vendor's interest in the property exceeded those of the vendee and where there was danger that the buyer would damage, alienate or waste the goods if notice were given prior to seizure.

Moreover, under that statute the debtor could immediately have a full hearing on the matter of possession, and in the interim the seller had to upt up a bond for double the amount of the goods to guarantee any damage as well as attorney fees. Thus, in such case the court determined that due process was afforded.

In Boddie v. Connecticut, supra, the court pointed out that there is a root requirement that an individual be given opportunity for hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event, citing Cafeteria and Restaurant Worker's Union v. McElroy, 367 U.S. 86, 82 Sup. Ct. 1743.

Here there was no extraordinary situation where any valid government interest was in jeopardy. The only jeopardy here was to the business and property of the taxpayer which would be lost through a devalued forced sale which customarily follows seizure.

In the Cafeteria and Restaurant Worker's v. McElroy case, supra, the item involved there was a mere privilege, not a right, the privilege being that of having a badge to enter a gun factory. Here, no mere privilege is involved but the right to operate a going business and ownership of property.

In the Board of Regents v. Roth case, 408 U.S. 564 again no property interest was involved for there a non-tenured assistant professor was not rehired for the next year.

In the Sandnes Sons, Inc. v. United States, 462 F.2d 1388, supra, the issue there related to renegotiation of a government contract. The court held that it was too late to litigate after a sale had wiped out an item and merely referred to the Phillips case, the reference being of no real significance.

It is therefore submitted that factually and legally none of the cases relied upon by the Appellate Court are comparable or have any relevancy to the factual issues here presented. This court should settle this important constitutional issue of due process

under the Fifth Amendment and lay down guidelines under which seizure of a taxpayer's or citizen's property may be undertaken by agents of the federal government.

3. The Act of the Internal Revenue Agents Violated The First Amendment Rights of These Petitioners of Freedom of Speech and Movement.

Petitioners, with others, were conducting peaceful picketing and a demonstration on the streets of San Diego to draw attention of the public to what they deemed to be excessive and arbitrary action by the Internal Revenue Service inthe wrongful seizure of the business and property of Mr. Heck.

Prior to conducting the demonstration and picketing, the demonstrators had called the San Diego police to be on hand to keep peace and maintain order. No arrests were made for any breach of peace by the San Diego police. (Although several citizens requested that they arrest the plainclothes IRS agents who appeared to be indiscriminately assaulting persons in the crowd.)

The agents were obviously not on there to protect property for notwithstanding their claim of such purpose, none of them were in

front of the only door which had access to the building, a building which they were holding, yet which now admit that they had not lawfully seized.

It was when Mr. Heck broke the glass of his front door, turned the latch and walked in that the IRS agents and FBI over reacted, shoving persons into the building, arresting those therein and fanning out into the crowd, grabbing and grappling anyone with whom they came in contract and utlimately arresting them for resisting or interferring with federal officers in the course of performance of their duties.

The Court of Appeals has ruled that as Mr. Heck had ownership and use of his real property he was entitled to break as many doors or windows as he desired.

The land and buildings had not been seized, yet the IRS agent in charge, Mr. Dunlap, testified that it was his understanding that the business had been seized and "now belonged to the United States Government" and he was protecting that business (Rep. Tr. p. 1027, lines 20-25). He gave instructions that anyone entering the premises should be placed under arrest and taken into custody (Rep. Tr. p. 977, lines 22-24).

Petitioner Burnham was shoved violently into the building by the push of the on-rushing IRS and FBI officers and then

arrested. It is alleged he came incontact with Agent Dunlap, yet the FBI agent standing by said no contact was made (Rep. Tr. p. 1078, lines 9-24).

Petitioners Mitzners were attacked on the streets of San Diego, long after the event had come to rest, by Agent Rodriguez and then arrested for resisting arrest and assault in trying to get out of the clutches of this incognito agent who was dressed the same as another man in the crowd (Rep. Tr. p. 389, lines 7-14, 21-24, p. 391, line 19 through line 8 of p. 392).

If the property was not seized, and the court has so ruled, if there was no attempt to rescue and the court has so ruled, what right then did these federal officers have to restrict the freedom of movement and speech of petitioners on the premises and on the streets in San Diego?

Mr. Heck testified that he owned the property on May 9, 1972, that he was under the belief that the property was not seized and that he had no objection to Dr. Burnham going onto the property (Rep. Tr. p. 1148, line 19 to line 5, p. 1149).

The government cannot restrict, restrain or stiffle freedom of movement unless clearly specified by statute.

Aptheker v. Secretary of State,
378 U.S. 500, 84 Sup. Ct. 1659.

"It is axiomatic that no federal official may limit a person's freedom without authority, either clearly specified in a statute or plainly implied from constitutional recognized common law sources."

United States v. Tarlowski,
305 F. Supp. 112, p. 122
(N.Y. 1969).

4. The Prosecution-Controlled Secret, Unrecorded Grand Jury Proceedings in This Case Denied Due Process of Law Guaranteed Under the Fifth Amendment of the United States Constitution.

The concept of grand jury secrecy and independence first received judicial recognition in 1681 as a result of the Earl of Shafesbury trial, 8 How. St. Tr. 759, 771-74 (1681) which case was celebrated as a bulwark against the oppression and despotism of the crown.

See Calkins "Grand Jury Secrecy"
63 Mich. L. Rev. 455 (1965)
at p. 457.

The policy of grand jury secrecy, originally designed as a defendant's protection, has now become a prosecutor's weapon. Indeed, the Fifth Amendment grand jury "guarantee" itself is now invoked only by the prosecution. No man suspected of crime in this country asks that his case be reviewed by a grand jury. He wants a preliminary hearing where he can confront and cross-examine his accusors, learn something about the case against him, use the transcript of testimony to prepare for trial and to impeach and refresh recollections of witnesses.

The preliminary hearing procedure is unobjectionable to everyone but the federal prosecutor who knows that it assists the defendant in preparation of his defense and who, therefore, invariably selects the secret grand jury procedure.

When, as in California, grand jury transcripts are given to the indicted defendant, the grand jury becomes virtually obsolete except for use in a few selected cases, and the preliminary hearing procedure is generally followed.

Graham & Letwin. "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations," 18 U.C.L.A. L.Rev. 638 and 678.

In California where the vast majority of felonies are prosecuted by preliminary hearings, with the right of the defendant to confront and cross-examine witnesses and where, in the rare case, prosecuted by indictment, the defendant automatically receives a copy of the transcript of the grand jury hearings.

California Penal Code, Section 938.

It is no wonder that the grand jury was abolished in England in 1933 as serving no useful purpose (Indictable Offenses Act 1848-17, Administration of Justice Act 1933).

In England where the grand jury proceedings originated in 1066, the committal proceedings have now been revised since 1967 to correspond greatly with our preliminary hearing procedure. (Criminal Justice Act of 1967.)

Here, in this case, it is obvious why no transcript was made of the testimony of the internal revenue agent who presented the obviously untrue and distorted facts to a grand jury which resulted in the indictments. It prevented impeachment of such testimony or attack on the sufficiency of the indictment.

The Court of Appeals makes the comment that no timely motions were made before the court to have the grand jury

proceedings recorded. Obviously not, because the indictment occurred before petitioners were aware of the proceedings and petitioner Charles Mitzner was, in fact, never arrested but surrendered to the Marshal at the time of appearing for plea.

In the interests of due process and to bring the federal government in line with modern procedure for criminal justice in this land, this court should settle this important question of federal law and determine that the grand jury proceedings as conducted herein denied to petitioners due process of law guaranteed under the Fifth Amendment.

5. The Excessive Security Measures Employed Influenced the Jury and Effectively Denied to Petitioners Due Process of Law Guaranteed Under the Fifth Amendment.

All of the defendants in this case were on bail. They were business men, students, doctors, craftsmen and contractors.

Nothing about their character or background was such as to indicate any appitude or propensity for violence. In fact, they were most conservative, both in appearance demeanor. The court had the opportunity to observe this

throughout the proceedings.

Additionally, there were no disruption in the trial, no outbursts by spectators, no demonstrations nor any reasonable basis to anticipate or justify excessive security measures the only effect of which would be to influence the jury that these defendants must have some violent characteristics and were sufficiently dangerous to warrant a great array of armed Marshals on hand at all times.

The greatest effect of influencing the jury in this regard occurred on the final day when the case was to be submitted to the jury. There appeared in the anteroom to the entrance of the courtroom itself 13 or 14 armed badge-wearing Marshals who set up an electronic detector device customarily used at airports to screen each juror, each defendant, each attorney and each spectator who went into the courtroom.

The effect on the jury could not be other than devastating.

Due process requires that an accused receive a fair trial by an impartial jury, free from outside influences.

Sheppard v. Maxwell,
384 U.S. 33, 86 Sup. Ct. 1507.

In this case the government cited a number of cases where security measures were

approved, such as U.S. v. Samuels, 431 F. 2d 610 (4th Cir. 1970), Loux v. United States, 389 F.2d 911 (9th Cir. 1968) and U. S. v. Greenwell, 418 F.2d 847 (4th Cir. 1969). However, in all of those cases there was some record of previous escape attempts and the defendants were in custody so that the measures taken were deemed proper under the circumstances.

No such circumstances existed here and clearly the jury in reaching the verdict in this case, was greatly influenced by the massive array of armed Marshals leading them obviously to believe that there must be facts of violence relating to these defendants which was not brought out in the evidence. This was truly a denial of due process.

6. The Actual Seizure in This Case, Not Having Been in Compliance With Applicable Law, Was in Violation of the Fourth Amendment of the United States Constitution.

Assuming arguendo the validity of Section 6331 of Title 26 U.S.C., the procedure for effecting seizure is to take possession of the item and as soon as practicable to deliver to the owner a signed Notice of Seizure.

Title 26, Section 6335 U.S.C.

The date on which a levy on property is made shall be the date on which this Notice of Seizure provided in Section 6335(a) is given.

26 U.S.C. Section 6502(b).

Section 6331 of Title 26 U.S.C. and Section 6334 of Title 26 U.S.C. provide that exempt property is not subject to seizure at all, and the procedure is outlined in Section 6334 for handling this.

Here, the revenue officer, Mr. Williams, acknowledged that he changed the locks on the doors and seized the business (Rep. Tr. p. 289, lines 18-22) then admitted that no Notice of Seizure as required by Section 6335 was ever given as to the Heck Van and Storage business (Rep. Tr. p. 307, line 25 to line 11, p. 308).

It was stipulated in open court that the real property had not been lawfully seized.

Having thus been shown that neither the business nor the real property had been lawfully seized in accordance with the procedure provided in the Internal Revenue Code, the agents fell back on the fact that the personal property in the building (which were books and items necessary for the trade or business and which were of a value

of less than $250.00) had been seized by them.

However, under Section 6334 of Title 26 U.S.C. these are not subject to seizure, and the officer acknowledged that he did not appraise the property or follow the procedure set forth in that section.

These were items that were capable of manual delivery and if their legal custody had been sought they should have been physically taken into possession.

Hale v. Henkel,
201 U.S. 43, 26 Sup. Ct. 370;

Yokahama, etc. v. Wong,
113 F.2d 329, 331, (C.C.A. Cal.).

Since the internal revenue agents did not follow the procedure provided by law for seizure, their acts and activities were utra vires, in excess of authority an unlawful seizure in violation of the Fourth Amendment of the United States Constitution, and a nullity. Here, the arrests were made as the result of this illegal seizure and the officers were, therefore, not acting under or pursuant to any statutory authority. In such a situation the indictments predicated upon such acts should have been dismissed, on the motions made.

See U.S. v. Calabro,
276 F. Supp. 284 (S. D. N. Y. 1967);

Pizzarello v. U. S.,
408 F. 2d 579 (2nd Cir. N. Y. 1969).

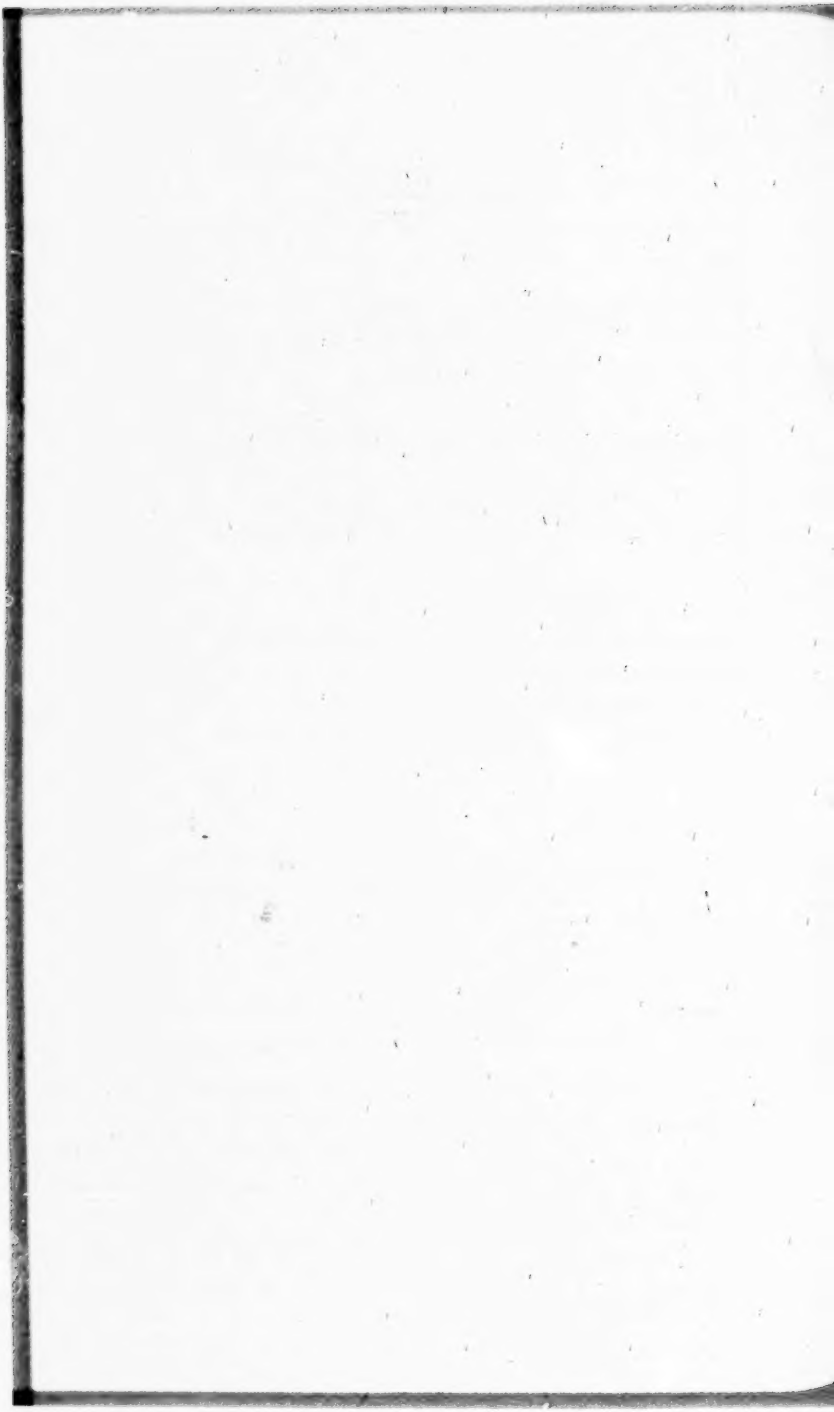
Consider also the recent case of this court

United States v. Giordano,
(decided May 13, 1974)
94 S. Ct. 1820

where failure to follow the statutory mode (wiretaps) resulted in the actions of the Federal officials being a nullity, and in suppression of the evidence thus obtained.

7. There Is a Conflict Between the Decision and Rule of the Court of Appeals in the Ninth Circuit and Decisions in Other Circuits.

(a) The petitioners requested instructions predicated on the decisions of United States v. Rybicki, 403 F. 2d 599 (6th Cir. 1968), U. S. v. Dentice, 289 F. Supp. 799 (E. D. Wisc. 1968) as well as United States v. Young, 464 F. 2d 160 at p. 163 (5th Cir. 1972) and United States v. Ulnan, 421 F. 2d 787 to the effect



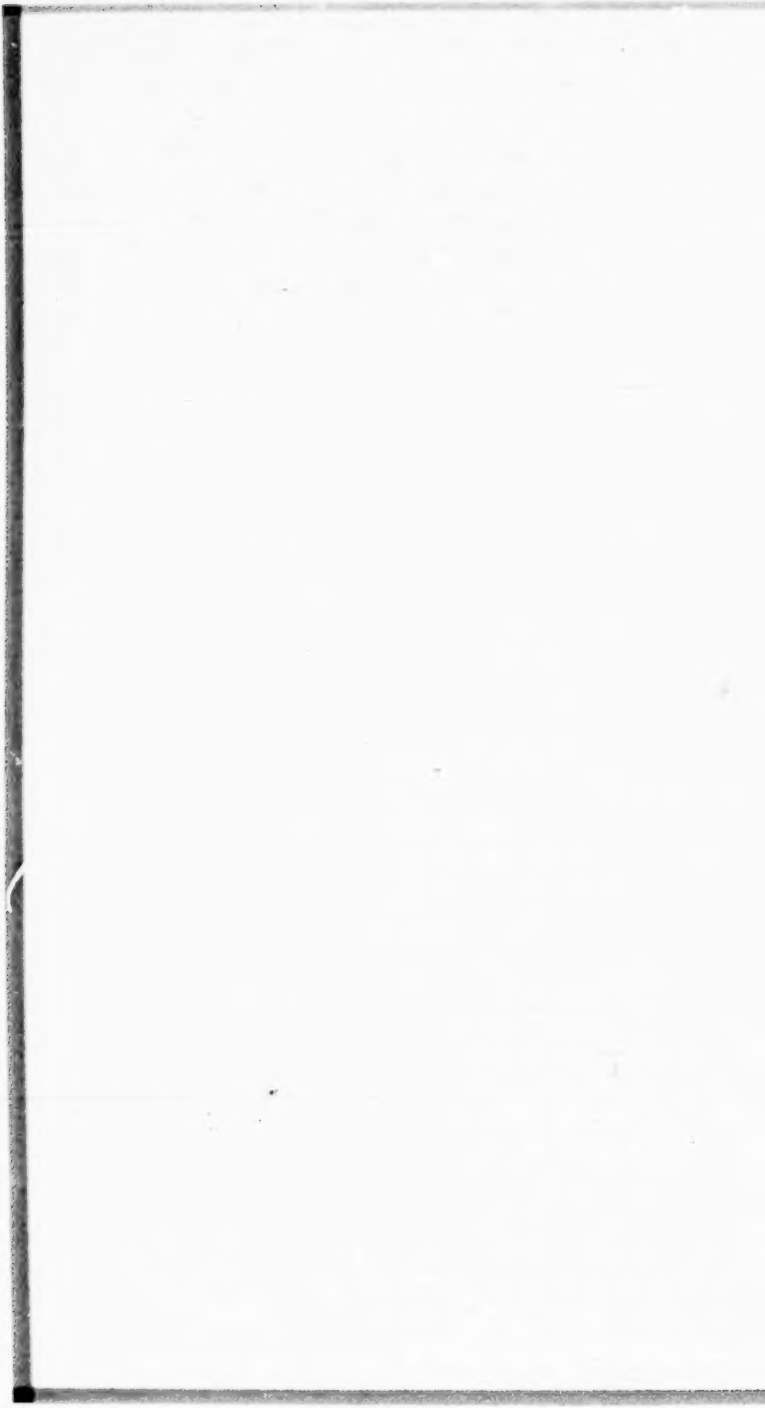
that in order to convict for a violation of Section 111 of Title 18, U.S.C. that it must be shown that defendants had knowledge of the fact that the persons involved were, in fact, internal revenue agents and that they were in the performance of their duties.

The court refused to give such instructions and the Court of Appeal sustained, apparently relying on United States v. Kartman, 417 F.2d 893, 894 (9th Cir. 1969) and McEwen v. United States, 390 F.2d 47 (9th Cir. 1968).

There is a direct conflict between circuits on this point of Federal Law which should be resolved by this court. As said in the case of U.S. v. Dentice, supra:

> "If the statute making it a crime to resist an officer in the performance of his official duties did not require that the officer, in fact, be acting in an official capacity -- i.e., pursuant to valid authority -- then criminal sanctions could be imposed upon a citizen for asserting his constitutional rights."

The case of U.S. v. Rybicki, supra, referred to the earlier case of Pettibone v. United States, 148 U.S. 197, 205, 13 Sup. Ct. 1541, which stated that on trial for resisting an officer it must be shown that



the person resisted was an officer and that the accused was aware of that fact. The Rybicki case also pointed out that in addition to the Pettibone v. United States, supra, case that Morisette v. United States, 342 U.S. 246, 263, 273 and 276, 72 Sup.Ct. 240, command a holding that an element of the crime under the Title 18, U.S.C. 111 was "knowledge" that the internal revenue agents were such, and were engaged in performing their duty.

In fact, the section itself specifically sets forth that the assault must be on a federal officer "while engaged in or on account of the performance of his official duties."

18 U.S.C. Section 111.

This is an intentional offense and therefore knowledge of the officer's capacity and performance seems logically an essential element.

(b) The Appellate Court sustained the district court that petitioners were guilty of conspiracy to assault and interfere with IRS agents. However, no instruction was given that the government had to prove, in order to establish the conspiracy, that defendants had specific knowledge of the official capacity of the internal revenue agents whom they allegedly conspired to assault. The Ninth Circuit is of the view

that such is not a requirement.

The case of United States of America v. Alsondo, et al., 486 F.2d 1339 (2nd Cir. Nov. 1973) expressly holds that specific knowledge of the official capacity of the assault victim must be proved in order to establish a conspiracy to violate Section 111 of Title 26, U.S.C.

This appears to be sound law and it is respectfully urged that this court should resolve the conflicts existing between these two circuits and determine and hold that proof must be made that there be specific knowledge of the capacity of the internal revenue officers in order to convict for the offense of conspiring to assault federal agents.

CONCLUSION

For the reasons set forth herein, and those asserted in the companion petitions for writs of certiorari to be filed by other petitioners in this same case, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit in this case.

Respectfully submitted,

G. G. BAUMEN

Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. JOHN ROBERT HECK, JR., ARMIN MOTHS, ERIC C. MOTHS, CHRISTOPHER RAYMOND BATES, STEVEN WAYNE MITZNER, JAMES B. MITZNER, LUCIEN B. BURNHAM, CHARLES EDWARD MITZNER, EDWARD F. ROSS, *Appellants.*	Nos. 73-1671 73-1672 73-1673 73-1674 73-1675 73-1697 OPINION

[January 30, 1974]

On Appeal from the United States District Court
for the Southern District of California

Before: BARNES and ELY, Circuit Judges, and
PLUMMER, District Judge.*

BARNES, Circuit Judge:

One or more of the eleven defendants who are parties to this appeal were charged in one or more counts of a superseding indictment (No. 13708), with having conspired to violate (Count I), or having substantively violated (Count II), 26 U.S.C. §7212(b).

All defendants were charged in Count III with having conspired (18 U.S.C. §371) to forcibly assault, oppose, resist, impede, or interfere with various federal officials, or (Counts IV to X) with substantively violating 18 U.S.C. §111.

We note the difference in the subject matter in section 7212(b) and section 111; and that a violation of section 7212(a) was not charged in the indictment.

*The Honorable Raymond E. Plummer, United States District Judge, Anchorage, Alaska sitting by designation.

26 U.S.C. §7212(b) reads as follows:

"(b) Forcible rescue of seized property.—Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years."

18 U.S.C. §111 reads as follows:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C. §1114, referred to in section III, lists United States Marshals, any officer or employee of the Federal Bureau of Information, or any officer, employee or agent of the Internal Revenue Service, as the officers protected by the statute.

The offense charged against all defendants in the first count of the superseding indictment filed in this case alleged a conspiracy "to forcibly rescue property seized at the Heck Transfer & Storage Co., which property had been heretofore previously seized by agents of the Internal Revenue Service,"[1] though still located on the Heck premises. The second count charges all defendants forcibly attempted to rescue the seized property (26 U.S.C. §7212(b)).

Counts III and IV to IX do not concern the seized property directly, but charge in Count III that all defendants conspired

[1]The court instructed the jury, after reading part of 26 U.S.C. §7212(b):

"The property seized in this case is only that described in Exhibits 13, 14 and 15."

These documents are lists of auto trucks, tractors or vans, valued at $400.00, and office furnishings, valued at $91.00.

"to assault, resist and interfere" with certain Government agents responsible for protection of the seized property, and in Counts IV to X, inclusive, various defendants were charged with the substantive offense of assaulting, resisting or interfering forcibly with various special agents of the Internal Revenue Service, while said agents were engaged in the performance of their official duties.

The theory of the first two counts rests on an alleged rescue of seized property. They differ from the remaining counts which rest on interference with the agents' performing their official duties.

A variety of verdicts were returned by the jury,[2] and varying sentences were imposed.[3]

I. *The Legality of the Seizure*

Certain of the defendants charge that the legality of the Internal Revenue Service seizure was an essential issue that was required

[2]Defendant Eric C. Moths was found guilty on Count II and not guilty on Counts I, III, and VII. The defendant Christopher R. Bates was found guilty on Count II, and not guilty on Counts I and III.

Defendant Steven W. Mitzner was found guilty of Counts I, II, and V, but not guilty on Count II.

Defendant James B. Mitzner was found guilty on Counts I, III, and VIII; not guilty on Count II.

Defendant Charles E. Mitzner was found guilty on Counts I, III, and IX, and not guilty on Count II.

Defendant Lucien B. Burnham was found guilty on Counts I, II, III, and IV.

Defendant Edward F. Ross was found guilty on Counts I and III and not guilty on Count II.

Defendant Dingwald was granted a severance of his trial by the trial court. Thus we need not consider herein Count X.

Defendant Hohenstein was found guilty but granted a new trial by the trial court.

[3]The defendant Burnham was sentenced on Counts I to Count VI, a fine of $1,000, but imposition of sentence of imprisonment was suspended and the defendant placed on probation for a period of three years. His sentence on Count II was made concurrent with Count I with a fine of $500. His sentences on Counts II and IV were concurrent with each other and concurrent with I, and the court fixed the fine at $1,000.

The sentence of James B. Mitzner, found guilty on Counts I, III, and VIII was the same as defendant Burnham's, $250, all counts concurrent.

The sentence of Eric C. Moths, found guilty on Counts I and III was similar to defendant Burnham's with a fine of $1,000 concurrent as to each count.

to be determined by the trier of fact before the defendants could be found guilty. The court instructed the jury the legality of the seizure was not before it.[4]

Cooper v. United States, 299 F. 483 (3rd Cir. 1924) states the contrary:

> "The offense denounced by the statute (26 U.S.C. §7212(b)) has two essential ingredients—seizure of merchandise and rescue of merchandise seized. But there is more to it than that. There must be an unlawful rescue of merchandise lawfully seized. United States v. Page (D.C. 277 Fed. 459). Hence, lawful seizure is not only an ingredient preliminary to an unlawful rescue but it is a prerequisite. And *lawfulness of the seizure must be shown*. This element of the offense cannot be pleaded by mere assertion or conclusion but *must be pleaded by facts.*"[5] (Emphasis added.)

The sentence of Charles E. Mitzner, who was found guilty of Counts I, III, and IV, was similar to Burnham's with a fine of $1,000 concurrent as to each count.

The sentence of Steven W. Mitzner, who was found guilty on Counts I, III, and V, was similar to that of defendant Burnham's all counts were concurrent with each other.

The defendant Christopher R. Bates was found guilty on Count II, fined $50; sentence of imprisonment suspended, and six months' probation granted without supervison.

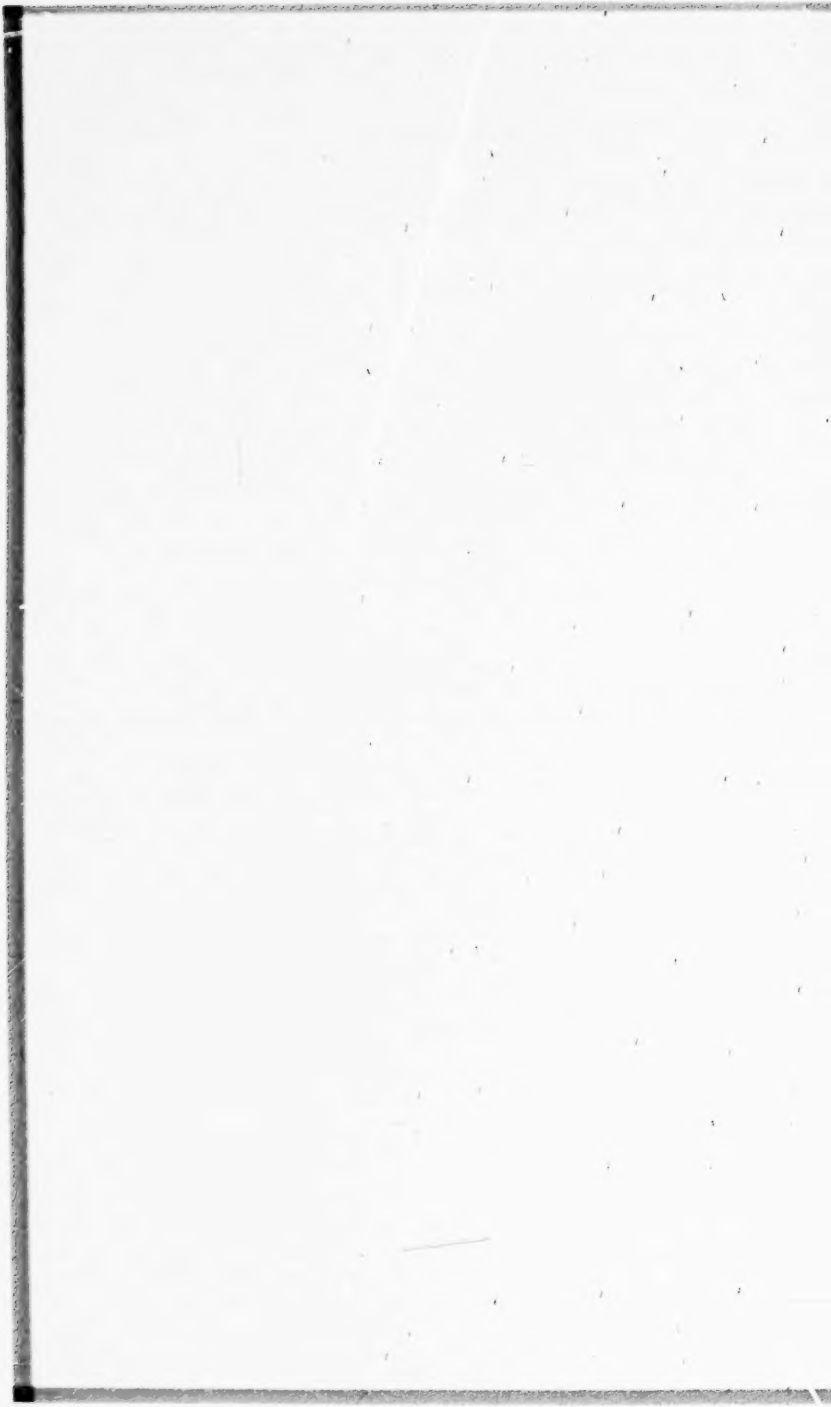
The sentence of defendant Eric C. Moths, who was found guilty on Count II, was similar to that of defendant Bates.

The sentence of Armin Moths, who was found guilty on Counts I, II, III, and VI; was fined $1,000 on Count I; imposition of imprisonment was suspended and probation for three years was granted with a $500 fine on Count II. concurrent with Count I; and Counts III and VI concurrent with Count I and each other.

The defendant Heck was found guilty on Counts I, II, and III, and sentenced to a $1,000 fine, imposition of imprisonment was suspended, and three years' probation was granted. Count II was ordered concurrent with Count I with a fine of $500, and Count II was senteneed concurrent with Count I, with a fine of $1,000.

[4]R.T., p. 1795, line 24, et seq.

[5]Shepardizing the *Cooper* case is of some, but little help. But one case is cited, *United States v. Scolnick*, 392 F.2d 320 (3rd Circuit 1968). The government refers to *Scolnick* as authority for the proposition that the validity of the government lien was irrelevant, as the district court in-



We note the Government's Brief cites other authority to support its position that it need not plead and prove a lawful seizure; namely:

1. *United States v. Oliver*, 421 F.2d 1034 (10th Cir. 1970). The jury passed on the defense the vehicle had not been properly seized, but found it had been. The instruction objected to by Oliver is not quoted in the decision. The *Oliver* panel preceded its reference to *Scolnick* by this language: "There is a dearth of cases discussing 26 U.S.C. §7212(b), however, we find the reasoning hereinafter quoted to be relevant."[6]

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structed the jury. Quoting from *Scolnick* at page 326, the government suggests that their position finds support in this language:

". . . The necessary premise for defendant's assertions is that they are relevant factors in a trial where a defendant is charged with the criminal offense of rescuing property seized by the Service *under the circumstances herein stated*. . . . To permit such issues to be raised in connection with a prosecution under these statutes would be to encourage violent self help *where civil remedies are admittedly available*. . . ." (Emphasis added.)

But the circumstances stated in *Scolnick* are not the circumstances found herein. The headnotes in *Scolnick* state in part:

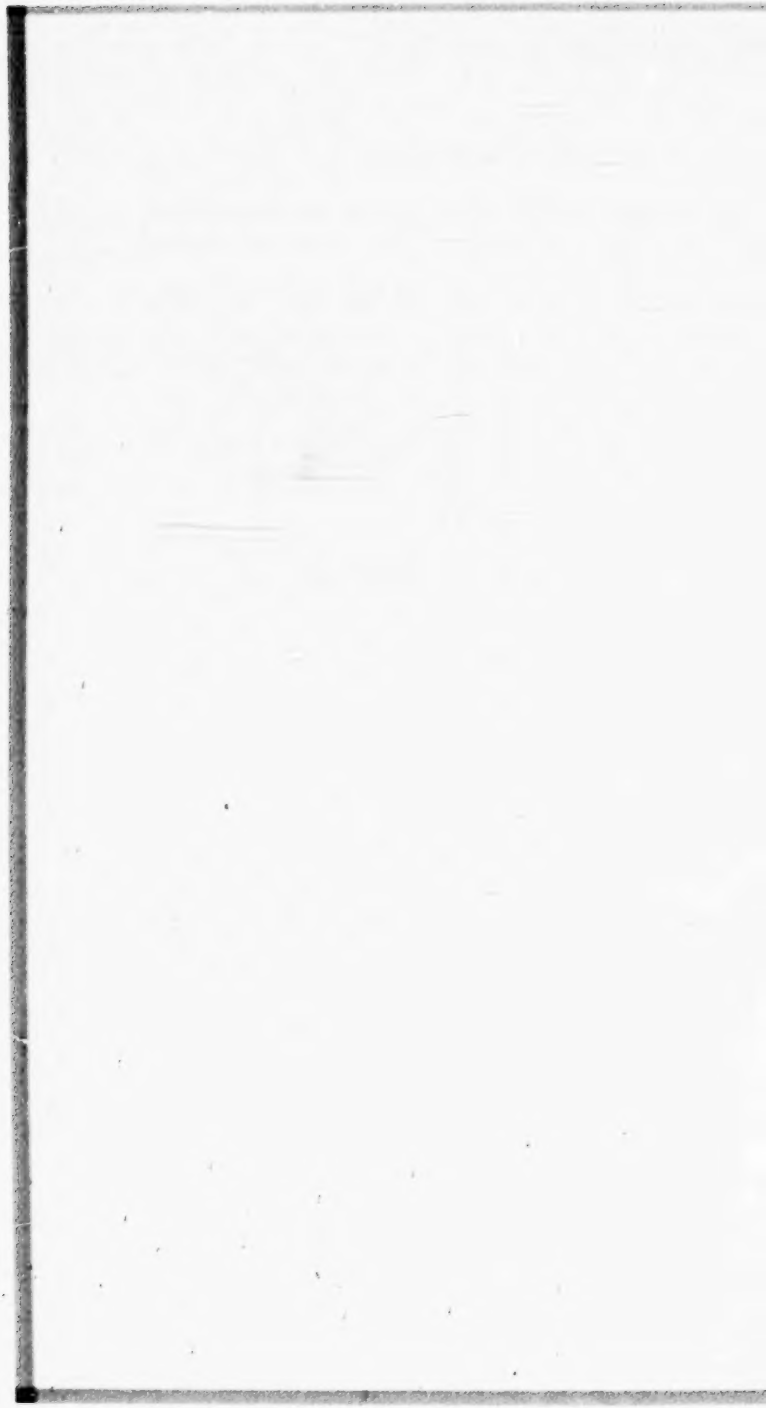
"6. Fact that evidence is illegally obtained exclusively by state officers does not automatically preclude its use in federal criminal trials."

"8. Federal officers are not required to comply with state statutes relating to searches of safety deposit boxes in order for evidence found therein to be admissible in federal prosecution."

"16. Once government has seized property belonging to defendant it has interest in such property so that defendant who takes such property from government's possession could be found guilty of rescuing property seized by the government."

[6]"The relevant facts adduced in the record indicate Oliver owed prior transportation taxes on his truck for two separate years. After consultation with an I.R.S. agent, Oliver signed a tax report showing the tax due and transmitted it to the proper office. Payment did not accompany the tax return because Oliver was unemployed and without funds to transmit to the I.R.S. During several intervening months there were discussions between the I.R.S. and Oliver relative to the delinquency. It is agreed that Oliver disclosed and I.R.S. knew there were two vehicles unencumbered which could be levied upon for payment of the tax.

"On September 5, 1968, the I.R.S. levied on wages then due from Oliver's employer, searched for a bank account in Oliver's hometown, and seized one of the vehicles. The agents marked the seized vehicle with a seizure sticker and tags and hired a tow truck to tow the vehicle to a



2. *United States v. Bernstein*, . 7 F.Supp. 84 (S.D. Florida, 1968).[7]

On such facts, the government, as here, relied on 26 U.S.C. §6331 to authorize the seizure.

We need not pass upon this legal question, however, in view of our disposition of the first two counts, as hereinafter appears.

II. *Evidence*

Turning to the facts of the case before us, we emphasize certain facts. The crime charged is alleged to have been committed on May 9, 1972. The federal tax lien was filed and recorded in San Diego County on March 23, 1972, covering the "1040 Tax Liability" of Mr. and Mrs. Heck for the two years ending December 31, 1968 and December 31, 1969. (Gov. Ex. No. 1). A levy in the amount of $8,336.73 was made on May 3, 1972 (Def. Ex. A), and Mr. Heck received copy of that levy (Gov. Ex. 5, para. 2), and a Notice of Seizure on May 4, 1972. (Gov. Ex. 13, 14, and 15). It was stipulated between counsel that the personal property was seized on May 9, 1972, and that the real property was seized on May 10, 1972 (R.T. 1796).

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location where it would be impounded while notice and sale were accomplished.

"While the I.R.S. agents were in the process of towing the vehicle from Oliver's home to the place where it would be impounded, Oliver came upon them, stopped the tow truck, and rescued the vehicle. He returned the vehicle to his home, later moving it to a neighbor's lot for safekeeping."

United States v. Oliver, supra, at 1036.

[7]"On December 14, 1967 a revenue agent went to the defendant's home to attempt to collect $1,990.83 in back taxes. The agent had a levy for four assessments. After discussion with the defendant and a refusal to pay, the agent attempted to execute the levy by seizing the defendant's two Cadillacs. The defendant physically interfered and prevented the seizure. The defendant was subsequently charged with violating 18 U.S.C. §2232 which provides:

'Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure of securing of any goods, wares or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same shall be * * *.'"

III. *Sufficiency of Evidence*

A question quickly arises. How could the seized personal property be, on May 9, 1972, the object of an attempted rescue unless some defendant touched it, or picked it up, or attempted so to do? No one, save Mr. Heck, touched it, or attempted to touch it. The government cannot rely on Mr. Heck breaking the glass in his front door, because title to the real property was his, subject to a lien, but prior to any seizure of it. He was entitled to break as many doors or windows as he desired prior to seizure. On May 9, 1972, Mr. Heck had ownership and use of the real property. (R.T. 243).

While there is a factual dispute between the parties as to "who pushed whom, if anyone," through the entrance door to the Heck premises, if there is no testimony of any attempt by any person, made inside or outside the building, to "rescue" anything seized, or to remove any personal property from the real property physically, the government's case has not been established.

The government, to supply this insufficiency, points to its Ex. 5, as proof of threats made by Mr. Heck, and his ultimatum, that if the government did not restore the property levied upon by the government to him—

> ". . . my friends, as concerned and irate citizens will see that I am put back into business under my guaranteed Constitutional Rights." (Gov. Ex. 5).

The difficulty with the prosecutor's position is the testimony of Officer Williams that he did not read Ex. 5 (the letter), prior to the fracas on May 9, 1972.

There was evidence also of oral "threats"—such as Dr. Ross': "[T]he property would be returned to Mr. Heck by 12 o'clock, or else" (R.T. 232), and "If you are prepared to arrest 200 people, you are welcome to try" (R.T. 233); "that California has no death penalty and that any action could be taken against police officers short of killing them in order to rescue seized property." (R.T. 235).

But there is no mention of threats, intimidation, obstruction, or impeding in section 7212(b), as there is in section 7212(a), and in 18 U.S.C. §111.

We have before and again emphasize that the government saw fit to sue the defendants on two different theories, requiring differing proof. The first was expressed as a conspiracy to rescue seized property, and the substantive crime of forcibly attempting to rescue it. The second theory was expressed as a conspiracy to assault and interfere with government officials, and in doing so.

The only acts, violent or otherwise, directed against the Heck property, was defendant Heck's breaking of the glass in the door to his unseized real property on May 9, 1972; his sitting at his seized desk inside said premises; the bandaging of his cut fingers, and some brave talk of future action suggested by defendants outside the Heck premises. At the most, Heck (in Ex. 9) threatened that there might be an attempt to rescue seized property.[8]

The government emphasizes in its factual recital that defendant Ross was outside the Heck premises "walking up and down . . . reading out of a book entitled, *The Big Bluff*" (Ex. A-Z), making "comments about there being no death penalty in California, and that any action could be taken against police officers short of killing them." When Heck picked up the large rock (shown in defendants' Ex. R) to break the glass, he was surrounded by "a group" of three or four persons on each side of him, which group shouted, "Those SOB's cannot stop us now."

The difficulty in relying upon such testimony to prove Counts I or II is that they do not prove an attempt to rescue the only seized property as of 12:00 noon on May 9, 1972; i.e., the personal property. There was evidence of certain intent to enter the locked Heck premises, and that some did, but that would not be sufficient to prove Counts I or II as to any defendant.

We have carefully examined the record, and conclude there is insufficient evidence to prove beyond a reasonable doubt that any defendant forcibly attempted to, or did, rescue seized property. We therefore reverse all convictions of the seven defendants convicted on Count I, and the five defendants convicted on Count II, upon the insufficiency of the evidence to establish a violation of 26 U.S.C. §7212(b).

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[8]The only overt act charged against defendants other than defendant Heck in Count I was that they "traveled" to the vicinity of 2165 Newton Avenue, San Diego, California.

The second theory pursued by the government against the various defendants in Count III was that all nine conspired (18 U.S.C. §371) to "forcibly assault, resist and interfere" with Internal Revenue officers responsible for the protection of seized (personal) property (18 U.S.C. §111) located at the Heck Transfer & Storage Company property at 2165 Newton Avenue, San Diego, California.

Defendants Eric Moths and Christopher Raymond Bates were found not guilty by the jury of the conspiracy charged in Count III. Eric Moths was found not guilty of assault on Dunlap (Count VII); and neither Moths nor Bates were charged with any other substantive count charging a violation of 18 U.S.C. §111, alone.

We need consider, therefore, only the convictions of defendant Heck as to Count III; of Armin Moths as to Counts III and VI; of Steven Mitzner as to Counts III and V; of James Mitzner as to Counts III and VIII; of Charles Mitzner as to Counts III and IX; and of Edward F. Ross as to Count III.

As to Count III, the government proved beyond question that various assaults took place on Internal Revenue officers, both on the sidewalk and street, and on the Heck premises. Five separate assaults were *charged* in Counts IV, V, VI, VII, VIII, and IX. The jury *found* a knowing assault, or resistance, or interference, was proved as to five of these six counts (*i.e.*, found Eric Moths not guilty on Count VII).

> "It is well established that in determining the sufficiency of the evidence to sustain a conviction, the evidence must be construed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969); *Kaplan v. United States*, 329 F.2d 561 (9th Cir. 1964); *United States v. Munns*, 457 F.2d 271 (9th Cir. 1972)." (Appellee's Brief, p. 66).

Viewing the evidence most favorable to the prosecution, there is no question but that the evidence is sufficient to support each of five specific violations of the law as to Armin Moths, the three Mitzners, and Lucien B. Burnham. First there are various photographs showing assaults, interference and resistance. Next, three or more eye-witnesses testified to each assault charge. All the Mitzner defendants were observed to assault Agent Rodriquez by witnesses Wrenn (R.T. 431), Timothy Buster (R.T. 744), Robert

Cotten (R.T. 521-554), and FBI Agent Maloney. The Burnham assault was observed by three agents, and the Moths' assault was observed by three agents.

Witness Wrenn was a photographer employed by the San Diego Union-Tribune newspaper, and had been for twenty-five years. He was disinterested, unprejudiced and was observant. He saw a "scuffle" between Agent Rodriquez and Dingwald, the man Rodriquez was trying to arrest. (R.T. 409). Wrenn testified he saw the three Mitzners "beating" at Agent Rodriquez (R.T. 430), and that he had taken a picture (Gov. Ex. 7) of them "pounding" at Rodriquez' back (R.T. 469, 432, 472) in the presence of defendant Ross. Rodriquez threw no blows. The police then arrived. (R.T. 431, 496).

The same witness, Wrenn, saw Armin Moths "throwing his arms around and kicking . . . pretty violent about it and lunging back and forth while being arrested and handcuffed." Wrenn saw no blows thrown by the officers (R.T. 432), nor did he see any officers initiate any "scuffles".

Wrenn also took defendants' Ex. AB (erroneously referred to as defendants' Ex. AC (R.T. 464), which shows Rodriquez putting the man in the yellow sweater (Dingwald) against an automobile, while he (Rodriquez) had hold of his arms from behind, and the crowd was trying to pull him (Rodriquez) away. (R.T. 465).

Wrenn heard the four or five men who were around Heek, when he approached the door, urge him to open the door. (R.T. 492). Among these men were Hohenstein and Charles and James Mitzner.

Cotten was a "waysman" in a shipyard. (R.T. 518). He was attending South Bay Trade School on May 9, 1972, located near the defendant Heek's place of business. He was apparently a disinterested witness. He saw a bearded man "attack" a federal agent as the latter attempted to make an arrest, and he identified the man as Steven Mitzner, and the agent as Rodriquez. Cotten saw Charles Mitzner "kneeing" Rodriquez, and James Mitzner holding Rodriquez down.

One Mitzner brother also struck an agent just after defendant Heek entered the premises. Cotten saw no agent strike any person. (Defendants' Ex. AS).

Buster was a student at South Bay Trade School on May 9, 1972. He saw Steven Mitzner strike a special agent on his left forehead; and heard Steven Mitzner curse the agent. Buster saw James Mitzner push and shove two special agents; and saw two more people (who were not arrested) strike agents or interfere with arrests (Defendants' Ex. BK).

The foregoing is not all the evidence in the record indicating that defendant Armin Moths "forcibly assaulted, resisted and interfered with" Meyers; that the three Mitzners did the same to Rodriquez, and that Burnham did the same to and with Dunlap. We have cited references only to disinterested testimony.

There is thus clearly sufficient testimony in the record, viewed most favorably to the government's position as we must, to establish the guilt on the five substantive counts against Armin Moths, Burnham, and the three Mitzners.

A conspiracy is defined as a combination of two or more persons to accomplish some unlawful purpose, or some lawful purpose by unlawful means. It is a partnership for criminal purposes in which each member becomes the agent for every other member (R.T. 1790), when the conspiracy has been proven to exist, and that the person charged was one of its members.

Under this definition, the evidence clearly enables a jury to find the required joint action between the five defendants substantively charged, and Dr. Ross and Mr. Heck. Thus a conspiracy stands proved on Count III.

We next consider the alleged errors charged, other than the sufficiency of the evidence to establish a conspiracy, and the five substantive counts. We follow the outline of the arguments contained in the government's brief, listing points III A to III R, inclusive.

There is no need, because of our conclusion with respect to Counts I and II to consider points III A, B, or C of the government's topical index, nor need we, in view of our conclusions as to the evidence, *supra*, consider further III R.

We find no necessity of answering in detail III D, that Congress has no power to delegate the collection of taxes. Appellants John R. Heck, Jr. and Evie W. Moths argue that Congress may not pass legislation delegating the power to lay and collect taxes because

the Sixteenth Amendment to the Constitution lacks an enabling clause. These appellants fail to realize that the collection power was vested in Congress prior to the passing of the Sixteenth Amendment.

Congress had the power to collect taxes on income prior to the passage of the Sixteenth Amendment and to make all laws necessary for carrying into execution this power under Article 1, Section 8, Clause 18 of the Constitution. *Cf. Erwin v. Cranquist*, 253 F.2d 26, 27 (9th Cir. 1958), *cert. denied*, 356 U.S. 960 (1958).

III E. *Constitutionality of Conspiracy Statute*

Title 18 U.S.C. §371 (the conspiracy statute), has repeatedly been held constitutional. In *United States v. Edwards*, 458 F.2d 875, 883 n. 7 (5th Cir. 1972), the claim that such statute was unconstitutional was held "clearly without merit," and "unworthy of comment." "'The section has been widely applied in the prosecution of frauds upon the revenue' . . . since 1867." This "is a valid statute." *Cullen v. Esola*, 21 F.2d 877, 879 (1927).

III F. *Opinions as to Constitutionality*

Appellant Heck had no right to express his opinion or belief that tax laws are unconstitutional in the courtroom as a witness during the trial of this case. Unless a defendant can qualify as an expert witness, no expression of opinion alone is admissible.

> "One may not disobey a law even in the good faith that it is unconstitutional and, on that ground, avoid the consequences of his act if the law is within the constitutional power of Congress."
>
> *Warren v. United States*, 177 F.2d 596, 600 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950);
>
> *Finn v. United States*, 219 F.2d 894 (9th Cir. 1955), *cert. denied*, 349 U.S. 906;
>
> *Harris v. United States*, 412 F.2d 384, 390 (9th Cir. 1969).

III G. *Security Measures*

The trial court had the discretion to institute security measures on the last day of the trial, including the presence of United States Marshals and the use of an electric magnometer. The trial judge

had (a) received veiled threats in the mail (R.T. 134 and 1779); and (b) information that a demonstration was planned for the courtroom. (R.T. 1609, 1770). Spectators had been previously admonished for their loud comments. (R.T. 279).

The trial judge did not abuse his discretion. *United States v. Greenwell*, 418 F.2d 846, 847 (4th Cir. 1969); *Loux v. United States*, 389 F.2d 911, 919 (9th Cir. 1968).

III. H. *Failure to record Grand Jury Testimony*

Appellants S. Mitzner, J. Mitzner, C. Mitzner, Burnham, and Ross and A. Moths argue that the failure to record grand jury testimony constitutes reversible error. They further contend that the presentation to the Grand Jury was based upon erroneous facts.

Appellants made no timely motions before the court to have the grand jury proceedings recorded. Further, recording is permissive, not mandatory. F.R.Crim.P. Rule 6(d); *United States v. Trenary*, 473 F.2d 680 (9th Cir. 1973); *United States v. Daras*, 462 F.2d 1361 (9th Cir. 1972). In addition, appellants were afforded complete discovery and, as a result, were in no way prejudiced by the failure to record. *Reyes v. United States*, 417 F.2d 916 (9th Cir. 1969).

III I. *Motions for Severance*

In *Parker v. United States*, 404 F.2d 1193, 1196 (9th Cir. 1968), this court stated:

> "Joint trials of persons charged together with committing the same offense or with being accessory to its commission are the rule, rather than the exception. There is a substantial public interest in this procedure. It expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. . . ."

Each defendant need not have participated in every act or transaction. This is evident from the express statement in the rule that all of the defendants need not be charged in every count. *Mendez*

v. United States, 349 F.2d 650 (9th Cir. 1965), *cert. denied*, 384 U.S. 1015 (1966); *Williamson v. United States*, 310 F.2d 192 (9th Cir. 1962). Further, a joinder in one indictment of a conspiracy count and substantive counts is permissible under Rule 8(b). *Baker v. United States*, 383 F.2d 604, 607 (9th Cir. 1968).

All charges in this case arose out of the same series of transactions. The events culminating in the arrests sprang forth from the demonstration in front of the Heck property. All appellants were present at the demonstration.

III J. *Was Appellant A. Moths Denied His Sixth Amendment Right of Confrontation By the Government's Failure to Call Agent Meyer?*

We adopt the government's answer *en toto* to this argument,[9] and find no prejudicial error.

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[9]"Appellant A. Moths was found guilty in Count Six of assaulting and interfering with Special Agent Robert Meyer. During the trial, Agents Dunlap (R.T. 974), Zarndt (R.T. 1045), and Graham (R.T. 1064) all testified that they observed A. Moths assault Agent Meyer. Agent Meyer did not testify. His testimony was originally scheduled for rebuttal, but when the defense testimony did not weaken the government's case, the decision was made not to call Agent Meyer. This would have only prolonged the two-week trial being held during the Christmas holiday season. No attempt was ever made by any appellant to subpoena Agent Meyer.

"The Confrontation Clause requires that an adequate opportunity for cross-examination exists. This may be satisfied even in the absence of physical confrontation. *Douglas v. Alabama*, 380 U.S. 415, 418 (1964).

"A defendant has no right to confront a 'witness' who provides no evidence at trial. *United States ex rel. Meadows v. New York*, 426 F.2d 1176, 1184 (2d Cir. 1970); *United States v. Russell*, 282 F.Supp. 106, 112 (E.D. Pa. 1968). Nor is the government required to call all of the witnesses to a crime. *Rivera v. United States*, 318 F.2d 606, 607 (9th Cir. 1963); *United States v. Mosby*, 422 F.2d 72, 74 (8th Cir. 1970).

"Appellant could have called Agent Meyer if he had desired to do so. His right of confrontation was satisfied by this available opportunity. There is no evidence to indicate that the failure of the government to call Meyer was induced by any improper motive. His testimony would have been cumulative and the government was not required to call him." (Government Brief, at 45 and 46).

III K. *Hearsay Statements Are Admissible If Made By a Conspirator in Furtherance of The Conspiracy or are Admitted to Show State of Mind and Intent.*

Appellants Heck and E. Moths assert that various hearsay statements should have been excluded. These statements include: (1) the testimony of Agent Clovis setting forth appellant Ross' statement that ". . . if I could arrest 200 people I was welcome to try" (R.T. 876, ll. 9-11); (2) the testimony of witness Timothy Buster that he overheard appellants E. Moths and A. Moths discussing the fact that *someone* was going to bust in the door of the Heck building (R.T. 738, ll. 8-12); (3) the testimony of Revenue Officer Williams that appellant Ross made statements about there being no death penalty in California and using force short of killing an officer to rescue seized property (R.T. 235); (4) the testimony of Agent Clovis that co-conspirator Hohenstein stated he was at the demonstration for the purpose of restoring the seized property by entering the premises (R.T. 880, l. 21-25; 881, l. 11-15) and (5) the testimony of FBI Agent Maloney that prior to the arrival of the agents of the FBI, the Internal Revenue Service told him they had made a seizure of the Heck company (R.T. 816-817). The first four statements were made by co-conspirators. Each was properly admitted as a statement in furtherance of the conspiracy. In addition, the statements of co-conspirator Ross about arresting 200 people and the statement of co-conspirator Hohenstein are admissible for the purpose of showing state of mind and intent. The fifth statement by Agent Maloney was not offered for the truth of the matter, but merely to show why the FBI went to the Heck premises.

Hearsay statements made by a co-conspirator in furtherance of the conspiracy are admissible. *Glasser v. United States*, 315 U.S. 60 (1942); *Logan v. United States*, 144 U.S. 263 (1892); *Carbo v. United States*, 314 F.2d 718, 735 (9th Cir. 1963). The appellants acknowledge that this is the law, but argue that the conspiracy must be established prior to the admission of the statements. However, it is within the trial judge's discretion to admit the declarations and acts of an alleged co-conspirator subject to later proof of the existence of the conspiracy. *United States v. Castanon*, 453 F.2d 932, 934 (9th Cir. 1972); *Enriquez v. United States*, 314 F.2d 703, 705 (9th Cir. 1963).

III L. ***The Trial Judge Did Not Abuse His Discretion by Failing to Ask All Of the Proposed Voir Dire Questions.***

It is well established that the scope of the *voir dire* examination and the procedures to be utilized therein are matters within the sound discretion of the trial judge, and will not be disturbed on appeal unless the procedures used or the questions propounded are so unreasonable or devoid of the constitutional purpose as to constitute an abuse of that discretion. *Haslam v. United States*, 431 F.2d 362, 364 (9th Cir. 1970); *Rodgers v. United States*, 402 F.2d 830 (9th Cir. 1968); *Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967).

We find no abuse of discretion.

III M. ***The Trial Court is Not Required to Instruct That the Circumstantial Evidence Must be Adequate to Exclude Every Hypothesis Except That of Guilt.***

Appellant A. Moths urges this court to change its rule on circumstantial evidence and to adopt the California rule. This court has refused this invitation on past occasions. *United States v. Bojas*, 458 F.2d 1355, 1356 (9th Cir. 1972); *Sablan v. People of Guam*, 434 F.2d 837 (9th Cir. 1970).

The proper test is not whether the evidence excludes every hypothesis except that of guilt but rather whether the trier of fact could reasonably arrive at its conclusion. *United States v. Nelson*, 419 F.2d 1237, 1243 (9th Cir. 1969)

III N. ***The Jury Instructions Were Proper And Complete.***

We have carefully considered the objections raised to the instructions requested, but not given, and we find the judge's instructions proper, adequate, and not erroneous, and that they sufficiently and thoroughly covered all issues when considered, as we are required to consider them, as a whole.

III O. ***The Government did not Withhold Exculpatory Evidence.***

This alleged error had to do with the government's alleged failure to produce a photograph allegedly taken by IRS Agent Hair-

grove, which allegedly shows an individual not identified as a defendant, striking Agent Rodriquez.

Appellants made no attempt to obtain this photograph at trial. Further, the photograph was among those shown to defense counsel at pretrial proceedings. While it was not specifically pointed out that this was an individual who hit Agent Rodriquez, additional individuals who hit Rodriquez, other than appellants, were described in the report made available to the appellants prior to trial. In addition, at the trial itself, Agent Clovis asked defense counsel if he desired the photograph in question, and was given a negative reply.

Counsel for defendants brought out the fact that others hit Agent Rodriquez and argued that there was an issue of mistaken identity regarding his clients. He repeatedly emphasized the picture taken by Hairgrove. (R.T. 1707-1709, 1714). The appellants were in no way prejudiced by not having the actual picture. As the government urges, they were convicted because of the overwhelming amount of eyewitness testimony regarding these assaults.

We consider appellants' alleged errors III P. and III Q. to be without merit. They approach the frivolous, particularly when no objections were made by any defendant to them at the trial.

CONCLUSION

1. As to defendant Heck, we reverse his convictions on Counts I and II, and affirm his conviction on Count III.

2. As to defendant Armin Moths, we reverse his convictions on Counts I and II, and firm his conviction on Counts III and VI.

3. As to defendant Eric Moths, we reverse his conviction on Count II.

4. As to defendant Bates, we reverse his conviction on Count II.

5. As to defendant Steven Wayne Mitzner, we reverse his conviction on Count I, and affirm his convictions on Counts II and V.

6. As to defendant James B. Mitzner, we reverse his conviction on Count I, and affirm his convictions on Counts III and VIII.

7. As to defendant Charles Edward Mitzner, we reverse his conviction on Count I, and affirm his convictions on Counts III and IX.

8. As to defendant Lucien B. Burnham, we reverse his convictions on Counts III and IV.

9. As to defendant Edward F. Ross, we reverse his conviction on Count I, and affirm his conviction on Count III.

Remanded for re-sentencing on affirmed convictions, and any other required proceedings, if any.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-5-74—480

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. JOHN ROBERT HECK, JR., ARMIN R. MOTHS, STEVEN WAYNE MITZNER, JAMES B. MITZNER, LUCIEN B. BURNHAM, CHARLES EDWARD MITZNER, EDWARD F. ROSS, *Appellants.*	Nos. 73-1671, 73-1672 73-1675, 73-1697 OPINION ON PETITION FOR REHEARING AND TO MODIFY JUDGMENT

[June 5, 1974]

On Appeal from the United States District Court for the Southern District of California

Before: BARNES and ELY, Circuit Judges, and PLUMMER,* District Judge.

BARNES, Circuit Judge:

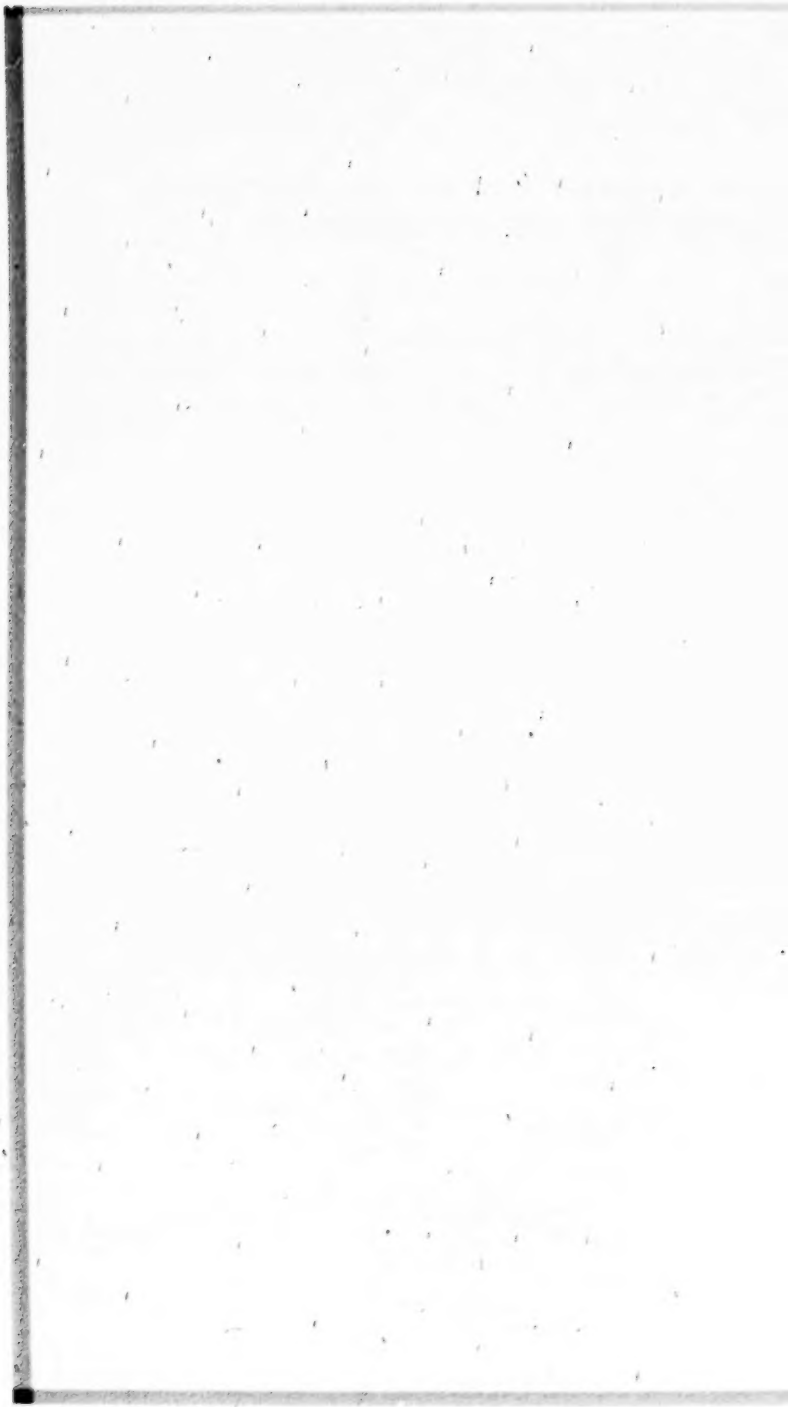
First, the various stays of mandate heretofore granted by this Court are severally vacated;

Second, the motion made by the Appellee-Government to correct this Court's opinion, filed January 30, 1974, is granted; and the following changes are made in said printed opinion:

(1) There is added to page 9, line 16 of the printed opinion filed, after Count III a comma, and the words "and of Lucien B. Burnham as to Counts III and IV."

(2) The reference to "Count II", page 17, line 31, is stricken, and "Count III" is inserted.

*The Honorable Raymond E. Plummer, United States District Judge, Anchorage, Alaska sitting by designation.



(3) After the word "Counts", on page 18, line 2, and before the words "III and IV" (same line and page), there are inserted the words "I and II, and affirm his conviction on Counts III and IV."

(4) Footnote 2, p. 3, line 19 is stricken entirely, and inserted in its place is "Counts I and III and V, but not guilty on Count II."

Third, we find no merit in the Petition for Rehearing filed on behalf of the three Mitzners and Burnham; and we deny it in every respect.

Mr. Bauman refuses to recognize that the indictment, in Counts III *et seq.*, while referring to the I.R.S. Agents' and officers' "responsibility for the protection of seized property" charges only an assault under 18 U.S.C. §111; and in Count III only, a conspiracy to assault in violation of 18 U.S.C. §111.

Further, the statute (§111) not only protects the person named in §1114 of Title 18 who "engaged in the performance of his official duties," but also protects those assaulted "on account of the performance of his official duties." (18 U.S.C. §111 and §1114). Certainly each officer assaulted was so assaulted "on account of his official duties."

While the alternative "on account of" language of the statute was not included in Count III, *et seq.*, the language used in indictment Counts IV to IX specifically followed the language of the statute, and sufficiently charge the acts complained of. They fully apprise defendants of the charges against them; and would prevent a second trial against them for the same acts, i.e., no double jeopardy could exist.

See United States v. Chunn, 347 F.2d 717, 721 (4th Cir. 1965) which quotes *United States v. Behrman*, 258 U.S. 280 (1922) (and later Supreme Court cases in note 7), and further states that the allegation which describes the person assaulted "as having been engaged in the performance of his official duties" is surplusage.

> "Thus, the indictment is sufficient without this phrase, and we consider such statement to be surplusage which may be ignored as a useless, innocuous averment. *See Ford v. United States*, 273 U.S. 593 (1927); *Bary v. United States*, 292 F.2d

53 (10th Cir. 1961); *United States v. Vasquez*, 319 F.2d 381 (3rd Cir. 1963)."

United States v. Chunn, supra, at 721.

We likewise classify as surplusage the government's allegation that the officers "were responsible for the protection of seized (personal) property."

Sub silentio, our opinion inferentially ruled that 26 U.S.C. §6331 was constitutional. We now specifically so hold.

"There is obviously an imperative public interest in favor of the prompt collection of delinquencies. But manifestly it cannot be validly considered an overriding policy in any particular situation unless Congress has so demonstrated its intention."

United States v. Sullivan, 333 F.2d 100, 119 (3rd Cir. 1974); *Phillips v. Commissioner*, 283 U.S. 589 at 595 (1930).

"[T]axes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection."

Bull v. United States, 295 U.S. 247, 259-260 (1935), quoted *in Perez v. Ledesma*, 401 U.S. 82, 127 (1971), note 17.

"There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut*, 401 U.S., at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of

property to collect the internal revenue of the United States, . . ."

Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972) citing *Phillips v. Commissioner, supra*, in note 24. *See Mitchell v. Grant*, ... U.S. ....., No. 72-6160, (decided May 13, 1974) 42 U.S.L.W. 4671. (The *Fuentes* language quoted is not overruled or affected by the *Mitchell* case.)

In *Sandnes' Sons, Inc. v. United States*, 462 F.2d 1388, 1392 (Ct. Cl. 1922), it was pointed out that in *Fuentes v. Shevin, supra*, "the Court expressly excludes revenue collection procedures from the scope of its decision."

Thus, no part of §6331 has been declared unconstitutional, and none of the cases cited by Mr. Bauman, either in his original brief or in his Petition for Rehearing, convince us that we can ignore the *Phillips* case, for there is here the precise, rare and extraordinary situation "where some valid government interest is at stake" that permits the deprivation of a protected interest—i.e., a prior hearing, and "justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) cited in *Board of Regents v. Roth*, 408 U.S. 564, 570, note 7 (1972).

Fourth, we find no merit in the Petition for Rehearing filed on behalf of defendant Hoek, and we deny it. His petition cites only to his breaking his glass door with a rock. His written "demand" and oral statements were sufficient, however, to show he was a co-conspirator to cause a confrontation with, and if necessary, an assault on, the officers.

Fifth, we find no merit in the Petition for Rehearing filed on behalf of Armin R. Moths. It first relies on Mitzner's and Burnham's Petition, hereinbefore discussed. It also raises the question as to whether there was proof Moths knew *of the official capacity* of the person assaulted, i.e., he suggests no criminal intent existed. Much reliance was placed by Moths on *United States v. Rybicki*, 403 F.2d 599 (Sixth Circuit, November 22, 1968). However, the facts in *Rybicki* were totally different than those here present, in that Rybicki was a veteran who had received injuries in the

Korean War, has previously been "annually hospitalized for from three to four months," and was then "regularly prescribed a tranquilizer to slow me down a bit." The court reciting the above and more, then said, "The law *and the special facts of this case* persuade us to reverse." 403 F.2d at 604. (Emphasis added.)

We rely on *United States v. Kartman*, 417 F.2d 893, 894 (1969); *McEwen v. United States*, 390 F.2d 47 (9th Cir. 1968); and *United States v. James*, 464 F.2d 1228, 1230 (9th Cir. 1962); where all judges cited and relied upon the *McEwen* case, *supra* at 50, which rejected the earlier cases, and described the rationale of why "knowledge that such person is a federal officer" was not a necessary element of 18 U.S.C. §111.

See cases listed in U.S.C.A. (18 U.S.C. §111, note 5), and particularly *United States v. Chunn*, 347 F.2d 717 (4th Cir. 1965), and cases collected (note 13).

Sixth, we find no merit in the Petition for Rehearing filed by appellant Edward F. Ross, appearing *in pro per*. We deny it.

Mr. Ross attacks the rule of law that "in determining the sufficiency of the evidence to sustain a conviction, the evidence must be construed *by the appellate court* in the light most favorable to the government." Citing no cases, he asserts that such a rule violates the United States Constitution. There is no such rule in the trial court, but scores of Supreme Court cases and hundreds of Courts of Appeal decisions have affirmed the rule here urged by the government, and followed, without deviation, by *all* Federal Appellate Courts. It is, as lawyers state, horn-book law.

Seventh, no Petition for Rehearing having been sought by defendant Bates, or Eric Moths, no action with respect to them is required.

All Petitions for Rehearing having been denied, and our opinion having been modified as set forth hereinabove, let the mandate issue forthwith.

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